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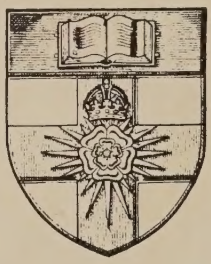

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1893.

THE

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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1893.

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314	17 from bottom	the appellant, the occupier of the lands.	the owner of the rent-charge.
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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

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THE HANFSTAENGL ART PUBLISHING COMPANY *v.* HOLLOWAY. 1893

Jan. 23, 24; *April* 15.

Copyright—International Copyright—Copyright Acts—International Copyright Acts, 1844 *to* 1886—*English Copyright in Foreign Painting or Book—Right of Owner to sue for Infringement without Registration under Copyright Acts—The Berne Convention of Sept.* 5, 1887—*Order in Council of Nov.* 28, 1887, *adopting the Berne Convention—Fine Arts Copyright Act*, 1862 (25 *&* 26 *Vict. c.* 68), *s.* 4—*Copyright Act*, 1842 (5 *&* 6 *Vict. c.* 45), *s.* 13—*International Copyright Act*, 1886 (49 *&* 50 *Vict. c.* 33), *s.* 6.

Held, by Charles, J., that registration in accordance with s. 4 of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), is not necessary in order to entitle the owner of the English copyright in a foreign painting to sue for infringement.

Sect. 6 of the International Copyright Act, 1886 (49 & 50 Vict. c. 33), enacts that "where an Order in Council is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such Order comes into operation, shall be entitled to the same rights and remedies as if the said Acts, and this Act and the said Order had applied to the said foreign country at the date of the said production; Provided that, where any person has

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before the date of the publication of an Order in Council lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

Such an Order in Council was made on November 28, 1887, and came into operation on December 6, 1887.

Held, by Charles, J., that the section applies to any literary or artistic work produced before December 6, 1887, the date at which the Order in Council of November 28, 1887, came into operation, whether produced before or after June 25, 1886, the date of the passing of the Act; and that the interest contemplated by the proviso is a direct subsisting pecuniary interest in the continuation of the production.

Fishburn v. *Hollingshead* ([1891] 2 Ch. 371) dissented from.

Moul v. *Groenings* ([1891] 2 Q. B. 443) followed.

CASE tried before Charles, J. The facts and arguments appear in the judgment.

Finlay, Q.C., and *Scrutton*, for the plaintiffs.

Sir E. Clarke, Q.C., Chadwyck Healey, Q.C., and *Method*, for the defendants.

Cur. adv. vult.

April 15. CHARLES, J., read the following judgment:—

The plaintiff company are the proprietors of the copyright, both in Germany and the United Kingdom, in a picture called the "Guardian Angel." It was painted for their assignor Hanfstaengl on commission in 1884. It was exhibited at Berlin in 1886, but no copies were allowed to be taken. The name of the painter, Bernard Plockhorst, was placed on the picture. The copyright was assigned to the plaintiff company on March 27, 1889. The defendants, Messrs. Holloway, who trade as Thomas Holloway, are sole proprietors of Holloway's pills, and have caused photographs of the picture to be copied on to cards which they issue for the purposes of their trade. They had bought these copies from a firm of Messrs. Beckmann Brothers, under orders given between June 9, 1887, and August 14, 1890. The copies supplied in conformity with the earliest order were made or produced in England by Messrs. Riddle & Couchman. The design was afterwards somewhat changed, and the later copies were made or produced in Germany. It was not denied that all the copies were infringements. The questions raised were

questions of law only, and, in order to appreciate them, I shall have to refer in detail to the legislation in this country affecting the copyright in works of art produced and books published in foreign countries. But, before doing so, I should state that the plaintiffs in 1891 discovered the infringement, and registered their copyright. If this registration was unnecessary, the damages were agreed at 100*l*. If it was necessary, the damages were, in my opinion, nominal, the writ having been issued within a few days of the English registration, and the defendants having given an undertaking immediately to discontinue the sale of copies of the picture.

The first Act to which reference must be made is the International Copyright Act, 1844, which, after repealing the International Copyright Act (1 & 2 Vict. c. 59), enacted, by s. 2, that Her Majesty, by Order in Council, might direct that authors of books, prints, and other works of art published abroad should have such copyright here as the Order should provide. Sect. 3 enacted that, if such Order applied to books, the Copyright Law as to books first published here should apply to the books to which such Order related, with certain exceptions. Sect. 4 contained similar provisions as to prints and other works of art. Sect. 6 enacted, among other things, that in the case of a book "the name and place of abode of the author, the name and place of abode of the proprietor of the copyright thereof, and the time and place of the first publication thereof in the foreign country named, should be entered in the register book of the Company of Stationers in London, and a printed copy delivered to the officer of the Company at their Hall." There are similar provisions in the same section as to prints or other works of art. Many Orders in Council were issued under this Act, and much difference of practice prevailed in the various countries to which the Orders applied. In order to obviate the inconveniences which thus arose, a conference of the Powers was held in 1885 at Berne, and a Convention, drafted in 1885, was agreed to on September 5, 1887, between Her Majesty and other Sovereigns, among whom was the German Emperor. Meanwhile the International Copyright Act, 1886, was passed. That Act, after reciting that a draft of a convention had been agreed on at Berne, and

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that it was expedient to enable Her Majesty to accede to it, enabled her to issue Orders in Council confirming the Convention. Accordingly, an Order in Council was issued on November 28, 1887, which was directed to come into operation on December 6. The rights of foreign authors in England now, therefore, rest mainly on the Berne Convention of September 5, 1887, and the Order in Council of November 28, 1887, issued under the authority of the International Copyright Act, 1886. It is necessary, therefore, to examine the provisions of the Berne Convention, the Order in Council, and the Act with some minuteness.

The Berne Convention (1) is expressed to be "for protecting effectually and in as uniform a manner as possible the rights of authors over their literary and artistic works." Article 2 provides that "authors of any of the countries of the Union shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or hereafter may grant to natives," and that "the enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin." Article 11 provides that "in order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the Courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner," and adds that "it is nevertheless agreed that the tribunals may, if necessary, require the production of a certificate from the competent authority, to the effect that the formalities prescribed by law in the country of origin have been accomplished as contemplated in Article 2." Article 14 provides that "under the reserves and conditions to be determined by common agreement, the present Convention applies to all

(1) The Order in Council, in the first schedule to which is an English translation of the Berne Convention, was published in the *London Gazette* for December 2, 1887.

works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin."

The Order in Council (1) schedules the Berne Convention, and provides that from December 6, 1887, it shall have full effect throughout Her Majesty's dominions, and that it shall extend, among other countries, to Germany. Clause 3 is as follows: "The author of a literary or artistic work which, on or after the commencement of this Order, is first produced in one of the foreign countries of the Copyright Union, shall, subject as in this Order and in the International Copyright Acts, 1844 to 1886, mentioned, have as respects that work throughout Her Majesty's dominions the same right of copyright including any right capable of being conferred by an Order in Council under s. 2 or s. 5 of the International Copyright Act, 1844"—the latter section refers to dramatic pieces and musical compositions—"or under any other enactment, as if the work had been first produced in the United Kingdom, and shall have such right during the same period: Provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein than that which he enjoys in the country in which the work is first produced. The author of any literary or artistic work first produced before the commencement of this Order shall have the rights and remedies to which he is entitled under s. 6 of the International Copyright Act, 1886."

By the 2nd section of the International Copyright Act, 1886, the Acts mentioned in the first schedule are collectively referred to as "International Copyright Acts," those in the second as "Copyright Acts." Among the former is the International Copyright Act, 1844; among the latter is the Fine Arts Copyright Act, 1862, to which I shall have presently, in connection with the second question which is raised in this case, more fully to advert. By the 4th section, sub-s. 1, of the International Copyright Act, 1886, it is enacted that, "where an Order respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country, except so far as provided by the Order."

(1) Ante, p. 4.

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By s. 6 it is enacted that "where an Order in Council is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such Order comes into operation, shall be entitled to the same rights and remedies as if the said Acts and this Act and the said Order had applied to the said foreign country at the date of the said production: Provided that where any person has before the date of the publication of an Order in Council lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date." By s. 11 the word "produced" means "published or made."

The Order in Council did not provide for the application of any of the provisions of the International Copyright Acts with respect to registry and delivery of copies of works, and it was, therefore, unnecessary for the plaintiffs to register their picture under the International Copyright Act, 1844. In Germany since 1876 there has been copyright in German works of art. If, as in the present case, the painter is named on the picture, the copyright subsists for his life and thirty years afterwards, and in the case of a named author no registration in Germany is necessary. Having regard to the terms of Article 2 of the Berne Convention, it does not appear necessary to decide whether the exhibition of the picture at Berlin amounted to a publication or not.

In this state of the law and of the facts, three questions present themselves for decision: First, does s. 6 of the International Copyright Act, 1886, apply to works published or made before the date of the passing of the Act, that is before June 25, 1886? Secondly, must the copyright be registered under the provisions of the Fine Arts Copyright Act, 1862, in order to entitle the owner to sue in respect of an infringement? Thirdly, does the proviso in s. 6 of the International Copyright Act, 1886, protect the defendants?

With regard to the first question, I am unable to feel any doubt that s. 6 of the International Copyright Act, 1886, applies to all

literary and artistic works produced before the date at which the Order in Council came into operation, whether they were produced before or after the passing of the Act. The words do not oblige me to hold the contrary, and to do so would, in my opinion, unduly limit the scope of the statute in a manner which cannot have been intended, and would render the Order in Council ineffectual in a large number of cases to which I believe it was meant to apply. But it is said that in adopting this construction I am offending against the maxim, "Nova constitutio futuris formam imponere debet, non præteritis," and giving to a section not expressly retrospective in its language a retrospective operation. The case of *Lauri* v. *Renad* (1) was referred to in support of this view, and reliance was especially placed on some passages in the judgments of Lindley and Kay, L.JJ. That case, however, merely decides that the language of s. 6 does not revive an already extinguished right, does not re-create an expired copyright, copyright in a translation which had come to an end before the Act came into operation. There is not, either in the language of the judgments or in the decision itself, anything inconsistent with the conclusion at which I have arrived. I am not, as it seems to me, giving the enactment any retrospective operation beyond what its words require. I regard it as co-extensive with Article 14 of the Berne Convention, and think that it may properly be applied, in accordance with the introductory words of the Convention, for the effectual protection of authors generally, as well of foreign authors whose works were published or made when the Act was passed, as of foreign authors who thereafter should publish or make works abroad. It may be here observed that this construction was placed on the section by Grantham, J., in *Moul* v. *Groenings* (2).

I proceed to consider the second question, with regard to which I was pressed to follow the opinion expressed by Stirling, J., in granting an interlocutory injunction in *Fishburn* v. *Hollingshead* (3); and had that opinion been final and necessary to the decision, I need scarcely say that I should have felt myself

(1) [1892] 3 Ch. 402. (2) [1891] 2 Q. B. 443, at p. 451.
(3) [1891] 2 Ch. 371.

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bound by it. But I find that the learned judge prefaced his elaborate examination of the Copyright Acts by observing, first, that, according to the view of the case which he took, it might be unnecessary to decide the question whether registration under the Fine Arts Copyright Act, 1862, was required, and, secondly, that he reserved to himself full liberty to reconsider his opinion at the trial of the action, a trial which, in fact, never took place, the interlocutory injunction having been made perpetual by consent. Under these circumstances, I think that I ought to consider the point for myself and decide it according to my own view of the construction to be put upon the statutes, the Berne Convention, and the Order in Council.

Now, prior to 1862, there was no statutory copyright in paintings in England. The preamble of the Fine Arts Copyright Act, 1862, recites the fact, in terms which appear to cover all copyright, but which must be restricted to copyright after publication, and that it is expedient to amend the law in this respect. The statute then enacts (by section 1) that "the author, being a British subject or resident within the Dominions of the Crown, of every original painting, drawing, or photograph .... shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, for the term of the natural life of such author and seven years after his death." Sect. 4 directs that "there shall be kept at the hall of the Stationers' Company, by the officer appointed by the said company, for the purposes of the Copyright Act, 1842, a book or books entitled 'The Register of Proprietors of Copyright in paintings, drawings, and photographs,' wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act .... and such memorandum shall contain a statement of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work .... and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration." The language here used certainly seems exclusively applicable to the authors named in section 1, that is, to British authors. But section 12

enacts that "This Act shall be considered as including the provisions of the International Copyright Act, 1844, in the same manner as if such provisions were part of this Act." We must, therefore, read into the Fine Arts Copyright Act, 1862, the 4th and 6th sections of the International Copyright Act, 1844, and these sections, and, in my opinion, these sections only, apply to foreign authors. The British author's work is to be entered in the register provided for by section 4 of the Fine Arts Copyright Act, 1862. The foreign author's work is to be entered in the register provided for by section 6 of the International Copyright Act, 1844. This construction, I may remark, is in harmony with the practice which has existed since 1862, as was proved by the chief clerk at Stationers' Hall. Foreign paintings have never been, in fact, registered in the book kept under section 4 of the Fine Arts Copyright Act, 1862. I should here notice the fact that the requirements of section 6 of the International Copyright Act, 1844, differ in some particulars from those of section 4 of the Fine Arts Copyright Act, 1862, and, with all respect for the opinion of Stirling, J., I cannot think that a foreign painting required registration under both sections. I am now speaking of the state of things between 1862 and 1886. But the reasoning of the learned judge undoubtedly involves the consequence that, as to foreign books, a double registration has been necessary since the passing of the International Copyright Act, 1844, first under the 6th section of that Act, and secondly under the 13th section of the Copyright Act, 1842. It has, however, always been considered, and I think rightly, that the provisions of the International Copyright Act, 1844, as to registration and delivery of copies superseded the provisions of the Copyright Act, 1842. I do not read the 3rd section of the International Copyright Act, 1844, as applying the provisions of the Copyright Act, 1842, as to registration and delivery of copies to foreign books. The Copyright Acts are to apply to them if "they shall have been registered *as hereinafter is provided*." The same words recur in section 4 of the International Copyright Act, 1844, with reference to works of art, indicating the mode of registration appropriate for them, and otherwise applying to them the Copyright Acts.

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It remains to consider the effect of the International Copyright Act, 1886, the Berne Convention, and the Order in Council on the foreign author of a book or painting, as the case may be. Is there to be found in these any obligation to register under the Copyright Acts? I can find none. Sect. 2, sub-s. 3, of the Act provides that "the International Copyright Acts and an Order made thereunder shall not confer on any person any greater right than that enjoyed in the foreign country in which such work was first produced." The 3rd clause of the Order in Council confers on the foreign author the same rights as he would have had if his work had been produced in the United Kingdom and during the same period, provided that he is to have no greater right or longer term of copyright than he enjoys in his own country. The 2nd Article of the Convention contemplates the placing of the foreign author and the native author on an absolutely equal footing. Here certainly there is nothing to cast on the foreigner the obligation of registering under s. 13 of the Copyright Act, 1842, in the case of a book, or under s. 4 of the Fine Arts Copyright Act, 1862, in the case of a painting. On the contrary, the language used appears to indicate that, even if such an obligation did previously exist, it was to come to an end; and, further, s. 4, sub-s. 1, of the International Copyright Act, 1886, provides for the specification in the Order of the provisions of the International Copyright Acts which are to attach. The object of the legislation to me seems clear. It was not designed to impose disabilities, but rather, if they existed, to remove them, and to leave the foreign and native author as nearly as might be on an equality. The foreigner who complies with the requirements of the law of his own country is to be protected in England; the Englishman who complies with the requirements of English law is to be protected in the foreign countries of the Copyright Union.

I now turn to the last question, the construction of the proviso in s. 6 of the International Copyright Act, 1886. In order to avail themselves of it the defendants must shew that, "before the publication of the Order in Council" of November, 1887, some one "lawfully produced the work in the United Kingdom." If they shew this, then nothing is to affect "any rights or interests

arising from or in connection with such production which were subsisting and valuable at such date." Now, here the first card, and the first card only, was produced before the date of the Order in Council. Does any right or interest arising from or in connection with such production exist either in the defendants or in any one else? There is, in my opinion, none in Messrs. Beckmann Brothers or in Messrs. Riddle & Couchman. But it is suggested that there is some right or interest in the defendants themselves, and Mr. H. Holloway, one of the defendants, stated that the card, both in its original and subsequent form, was valuable as an advertisement. He thought it was important to the defendants that they should continue to issue it. He was, however, unable to say whether the business would really suffer at all, or how much it would suffer, if the card were discontinued. He should, he said, like to continue to issue it. Now, it has been held in *Moul* v. *Groenings* (1), that the interest contemplated by the proviso must be pecuniary; there must be a direct subsisting pecuniary interest in the continuation of the production; and the evidence in this case does not to my mind prove that the defendants have any interest of that description. The plaintiffs claim no relief in respect of copies of the first card made before the date of the Order in Council; but the mere fact that these were ordered and paid for does not, in my opinion, of itself shew any interest in the defendants in the continuation of the production which can be described as "valuable."

In the result, therefore, my judgment must be for the plaintiffs with costs for 100*l.*, the sum agreed upon if registration under the Fine Arts Copyright Act, 1862, should be held by me to be unnecessary; and I grant an injunction in the terms asked, and an order for the delivery up of all unlawful copies of the work in the defendants' possession.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *Bentwitch.*

Solicitors for defendants: *Clarkson, Greenwells & Co.*

(1) [1891] 2 Q. B. 443.

H. D. W.

1893
Jan. 21;
Feb. 4;
April 29.

[CROWN CASE RESERVED.]

THE QUEEN *v.* THOMPSON.

Criminal Law—Evidence—Confession—Evidence of Confession, when admissible.

In order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such confession was free and voluntary, that is, was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed.

The prisoner was tried for embezzling the money of a company. It was proved at the trial that, on being taxed with the crime by the chairman of the company, he said, "Yes, I took the money," and afterwards made out a list of the sums which he had embezzled, and with the assistance of his brother paid to the company a part of such sums. The chairman stated that at the time of the confession no threat was used and no promise made as regards the prosecution of the prisoner, but admitted that, before receiving it, he had said to the prisoner's brother, "It will be the right thing for your brother to make a statement," and the Court drew the inference that the prisoner, when he made the confession, knew that the chairman had spoken these words to his brother:—

Held, that the confession of the prisoner had not been satisfactorily proved to have been free and voluntary, and that therefore evidence of the confession ought not to have been received.

CASE stated by the acting chairman of quarter sessions for the county of Westmoreland.

At the Westmoreland Quarter Sessions, held at Kendal on October 21, 1892, Marcellus Thompson was tried for embezzling certain moneys belonging to the Kendal Union Gas and Water Company, his masters.

Mr. Crewdson, the chairman of the company, at whose instance the warrant for the prisoner's apprehension had been issued, was called as a witness by the prosecution to prove among other things a confession by the prisoner.

As soon as this confession was sought to be put in evidence, objection was taken to its admissibility, and we therefore, before receiving further proof, allowed the witness to be cross-examined by the prisoner's counsel. In answer to the latter's questions, the witness stated that, prior to the confession being made,

the prisoner's brother and brother-in-law had come to see him, and that at this interview he said to the prisoner's brother, "It will be the right thing for Marcellus to make a clean breast of it." The witness added, "I won't swear I did not say 'It will be better for him to make a clean breast of it.' I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken." No evidence was produced to the Court tending to prove that the details of the interview had been communicated to the prisoner, or to rebut the evidence of Mr. Crewdson as to what took place at the interview.

It was then contended by the prisoner's counsel that the above statements to the prisoner's brother were inducements to the prisoner to confess, held out by a person in authority, and that evidence of the confession was therefore inadmissible.

We found that Mr. Crewdson was a person in authority, and we found, as a fact, that the statements made by him were calculated to elicit the truth, and that the confession was voluntary, and we accordingly admitted the evidence.

The witness then proved that after the interview he charged the prisoner with embezzling the company's money, and one of the directors told the prisoner that he was in a very embarrassing position. The prisoner replied, "I know that; I will give the company all the assistance I can." He said, in answer to witness's charge, "Yes, I took it; but I do not think it is more than 1000*l*. It might be a few pounds more." No statement was made to the prisoner that the confession would save him from prosecution; there was no threat or promise.

Subsequently the prisoner made out a list of moneys which he admitted had not been accounted for by him. This list we also admitted in evidence.

The prisoner was convicted and sentenced to three years' penal servitude.

The question for the opinion of the Court is whether the evidence of the confession was properly admitted.

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The case having been sent down for amendment, the following statement was added :—

At a meeting of the directors a question was asked by one of the directors as to the value of the stock on a farm occupied by the prisoner's brother, and it was suggested that a bill of sale over the stock should be given. The prisoner stated that the worth of the stock was over 1000*l.*, but that he could not accept the suggestion about the security without telling his brother. At the same meeting the prisoner said, "My brothers have got it" (meaning the money); "it has gone to pay interest on mortgages." Mr. Crewdson said, "I never agreed not to prosecute, if a bill of sale were given."

After the charge was made, 340*l.* was received from the prisoner, together with some money and an I.O.U. for 25*l.*, which were found in the cash-box. Of the sum of 340*l.*, 90*l.* was paid into the bank by the prisoner, and 250*l.* by his brother. Mr. Crewdson stated that no arrangement was made as to the discrepancy being treated as a debt, and that the sum paid was simply by way of restitution.

Shee, Q.C., and *Cavanagh*, for the prisoner. Evidence of the confession was not admissible. In the absence of proof by the prosecution that it was voluntary, evidence of a confession cannot be received: *Reg.* v. *Baldry* (1); *Reg.* v. *Warringham.* (2) Here no such proof was given. It has been repeatedly held that proof of the use of such an expression as "it is better to tell the truth" by a person in authority excludes evidence of a confession: *Reg.* v. *Gillis* (3); *Reg.* v. *Garner* (4); *Reg.* v. *Bate and Others* (5); *Reg.* v. *Doherty* (6); *Reg.* v. *Fennell.* (7) The finding that the words were "calculated to elicit the truth" shews that they operated as an inducement, by conveying to the accused that he would find it advantageous to admit his guilt. A confession shewn to have been brought about by such an inducement cannot be proved (3 Russell on Crimes, pp. 441, 442, 5th ed.).

Segar (with him, *C. M. Wilson*), for the prosecution. Evidence

(1) 2 Den. C. C. 430.
(2) 2 Den. C. C. 447, n.
(3) 11 Cox C. C. 69.
(4) 1 Den. C. C. 329.
(5) 11 Cox C. C. 686.
(6) 13 Cox C. C. 23.
(7) 7 Q. B. D. 147.

of the confession was admissible. It is not shewn that what passed between the prisoner's brother and the prosecutor was communicated to the prisoner. The words used were also advice on moral grounds. Confessions preceded by exhortations of this kind were held admissible in *Reg.* v. *Jarvis* (1), and *Reg.* v. *Reeve.* (2) The justices have found that the confession was voluntary, and it was for them to decide what words were used, and whether they were repeated to the prisoner in such a manner as to convey a promise or threat. Evidence of a confession is primâ facie admissible, and can only be excluded upon proof by the prisoner that the confession was not voluntary.

[They also cited *Rex* v. *Court* (3); *Reg.* v. *Moore* (4); and *Rex* v. *Clewes.* (5)]

Shee, in reply.

Cur. adv. vult.

April 29. The following judgment was read by

CAVE, J. The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in a number of cases both at petty and quarter sessions; and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted.

Many reasons may be urged in favour of the admissibility of all confessions, subject of course to their being tested by the cross-examination of those who heard and testify of them; and Bentham seems to have been of this opinion (Rationale of Judicial Evidence, Bk. v., ch. vi., s. 3). But this is not the law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his Law of Evidence (8th ed. Part 2, ch. 15, s. 872), "Before any confession can be received in

(1) Law Rep. 1 C. C. R. 96.
(2) Law Rep. 1 C. C. R. 362.
(3) 7 C. & P. 486.
(4) 2 Den. C. C. 522.
(5) 4 C. & P. 221.

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evidence in a criminal case, it must be shewn to have been voluntarily made; for, to adopt the somewhat inflated language of Eyre, C.B., 'a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and, therefore, it is rejected:' *Warickshall's Case.* (1) The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to shew *affirmatively*, to his satisfaction, that the statement was *not* made under the influence of an improper inducement, and who, *in the event of any doubt subsisting on this head*, will reject the confession."

The case cited in support of this proposition is *Reg.* v. *Warringham* (2), where Parke, B., says to the counsel for the prosecution: "You are bound to satisfy me that the confession which you seek to use against the prisoner was *not* obtained from him by improper means. I am not satisfied of that; for it is impossible to collect from the answers of this witness whether such was the case or not." Parke, B., adds, "I reject the evidence of admission, not being satisfied that it was voluntary." In *Reg.* v. *Baldry* (3) it is said by Pollock, C.B., that the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that "it would not be safe to receive a statement made under any influence or fear." He also explains that the objection to telling the prisoner that it would be better to speak the truth is that the words import that it would be better for him to say *something*. With this view the statutory caution agrees, which commences with the words: "You are not obliged to say anything unless you desire to do so." (4)

These principles are restated and affirmed by the present Lord Chief Justice in *Reg.* v. *Fennell* (5), in the following words:

(1) 1 Leach. C. C. R. 263, 4th ed.

(2) 2 Den. C. C. 447, n. The report is from the MS. note taken by Parke, B., at the trial at the Surrey Spring Assizes in 1851.

(3) 2 Den. C. C. 430, at p. 442.

(4) See the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 18.

(5) 7 Q. B. D. 147, at p. 150.

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"The rule laid down in Russell on Crimes is that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. It is well known that the chapter in Russell on Crimes containing that passage, was written by Sir E. V. Williams, a great authority upon these matters."

If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, Was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

In the present case the magistrates appear to have intended to state the evidence which was before them, and to ask our opinion whether on that evidence they did right in admitting the confession. Now there was obviously some ground for suspecting that the confession might not have been free and voluntary; and the question is whether the evidence was such as ought to have satisfied their minds that it was free and voluntary. Unfortunately, in my judgment, the magistrates do not seem to have understood what the precise point to be determined was, or what evidence was necessary to elicit it. The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected that what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that after Mr. Crewdson's statement, that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner making a clean breast of it, with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether

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any, and if so, what communication was actually made to the prisoner, before the magistrates could properly be satisfied that the confession was free and voluntary.

The magistrates go on to say that they inferred that the details of the interview would be, by which I suppose they intend to say that they inferred they were, communicated to the prisoner, which seems to have been the right inference to draw under the circumstances. They add that they found, as a fact, that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary. The first of these findings, if the ruling of Pollock, C.B., in *Reg.* v. *Baldry* (1) is, as I take it to be, correct, is entirely immaterial. The second finding, if it is a corollary from the first, does not follow from it, and, if it is an independent finding, is not warranted by the evidence; and, as the question for us is whether this finding was warranted by the evidence, I feel compelled to say that in my judgment it was not. Taking the words of Mr. Crewdson to have been, "It will be the right thing for Marcellus to make a statement," and that those words were communicated to the the prisoner, I should say that that communication was calculated, in the language of Pollock, C.B., to lead the prisoner to believe that it would be better for him to say *something*. All this, however, is matter of conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation.

I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession;—a desire which vanishes as soon as he appears in a court of justice. In this

(1) 2 Den. C. C. 430, at p. 442.

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particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate; but, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. In my judgment no other principle can be safely worked by magistrates.

LORD COLERIDGE, C.J., HAWKINS, DAY, and WILLS, JJ., concurred.

Conviction quashed.

Solicitors for the prosecution: *G. E. Cartmel, Kendal.*
Solicitors for the prisoner: *R. F. Thompson, Kendal.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.

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April 24.

HAIGH AND ANOTHER *v.* WEST.

Inclosure—Highway—Pasturage—Prescription—User—Presumption of Lawful Origin—Claim of Inhabitants of Parish to Land—Presumption of Grant to Trustees—Presumption of Enrolment—Presumption of Grant for purpose not requiring Enrolment—Charitable Uses Act (9 *Geo.* 2, *c.* 36)—*Vesting of Property of Parish in Churchwardens and Overseers*—59 *Geo.* 3, *c.* 12, *s.* 17.—*Statute of Limitations.*

By an award made under an Inclosure Act passed in the year 1774 certain lands were allotted and certain roads set out as public highways. From a short time after the passing of the Act the pasturage of one of the roads set out was let annually by the inhabitants of the parish in vestry assembled. The money received from the tenants was devoted to different parochial purposes, and there had been no interference or claim by the lords of the manor until the present action, in which the plaintiff, as lord of the manor, claimed damages from the defendant, who was tenant to the vestry, for trespass in pasturing his sheep in the road. There was no evidence in whom the soil of the road was vested before the passing of the Inclosure Act. No grant of the road was produced, and there was no evidence of the enrolment of any such grant:—

Held (affirming the judgment of Charles, J.), that a lawful origin must be presumed from the long usage, and that the presumption was that the road was vested in some person or persons as trustees for the parishioners:

Held, further, that a presumption might be made either that the grant of the road had been enrolled, or that the grant had been made for some purpose which had since been lost sight of, but which did not require that the deed should be enrolled:—

Held, further, that the churchwardens and overseers, as trustees under

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59 Geo. 3, c. 12, s. 17, of lands belonging to the parish, had gained a title to the road under the Statute of Limitations, subject to the public right of way.

ACTION claiming, on behalf of the plaintiff Haigh, a declaration that he was entitled as lord of the manor of Tetney, in the county of Lincoln, or as owner of lands adjoining a way called Westfield Lane, to the herbage and pasture in it, and for an injunction to restrain the defendant from grazing cattle and sheep upon the lane, and for damages for trespass by the defendant depasturing cattle and sheep upon the lane, and allowing the same to break through the hedges of the plaintiff's land. The other plaintiff, Baxter, the tenant under Haigh, claimed an injunction in the same terms and damages for trespass, by reason of the defendant's cattle and sheep having broken through the fences and eaten the grass and corn in the adjacent fields of which Baxter was tenant.

The defendant claimed a right as lessee of the vestry of the parish of Tetney to turn sheep and cattle into the lane.

An Inclosure Act was passed in the year 1774 (14 Geo. 3, c. 33), under which an award was made inclosing certain lands and directing the setting out of certain roads of which Westfield Lane was one. Charles, J., before whom the case was tried, came to the conclusion that the lane was within the manor of Tetney, but that there was no evidence in whom the land which became Westfield Lane was vested prior to the passing of the Act; and further, that the vestry of the parish had, from the year 1778 down to the present time, let the lane every year to persons who paid the hire of it and depastured it, and this without any interference or any acts of ownership done by the lord of the manor or any one else. The learned judge also decided that the presumption of the ownership of the lane being in the owner of the adjoining lands was rebutted. The character of the evidence and the mode in which the money paid for the hire of the lane was disposed of will be found indicated in the judgments.

There was a question, turning on the construction of the Inclosure Act, as to the legality of pasturing sheep in the lane, but the arguments and judgments on this point have been omitted from this report.

1893. Feb. 11. *Sir H. Davey, Q.C., H. D. Greene, Q.C.,* and *A. J. Ashton,* were for the plaintiffs.

Channell, Q.C., and *R. Younger,* for the defendant.

1893. Feb. 13. CHARLES, J. (after stating the nature of the claim and defence and examining the evidence and the provisions of the Inclosure Act, continued). I come, therefore, to the conclusion that the presumption that the plaintiff Haigh is entitled to the soil of this road and the herbage upon it as lord of the manor fails, and that the history of the road since the inclosure award is sufficient to rebut any idea that the owners of the allotted land are, or ought to be presumed to be, the owners of half Westfield Lane. It seems to me therefore upon that ground, if upon no other, the plaintiff Haigh must fail in this action.

But I now proceed with the rest of the case, and assume in favour of Mr. Haigh that his predecessors in title had, before the date of the inclosure award, some right or other, whether as lords of the manor or as proprietors, in the soil of Westfield Lane. [After dealing with the evidence of letting by the vestry, the learned judge continued:—] Now, what ought I to do in such a state of things as this? I find a uniform usage of 115 years in length. The defendant alleges that I ought to presume some lawful origin for this long usage, and I certainly think I am bound to do so if I can; and the first question I have to ask myself is whether a grant of the kind contended for can exist. It was strongly argued that it could not—that a grant to a fluctuating body of inhabitants would be a void grant—and I was referred generally to what the state of the law is upon such a matter. It is almost needless to say that a grant of this kind could not be made to such a fluctuating body as the inhabitants of a parish; but with reference to that objection, I think I ought to be guided by the judgments delivered in the House of Lords in the case of *Goodman* v. *Mayor of Saltash.* (1) There the Mayor of Saltash undoubtedly proved by prescription a right to a several fishery in the River Tamar, and the defendant claimed as of right as a free inhabitant of an ancient tenement

(1) 7 App. Cas. 633.

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to dredge for oysters between Candlemas and Easter Eve. The Court of Common Pleas and the Court of Appeal held that such a right, although it was proved to have been exercised as long as living memory extended, and although it had been claimed as of right, could not exist, because the inhabitants of these ancient tenements were a fluctuating body of persons, and persons who could not take a grant of that description. In the House of Lords a different view was taken, and it was decided that it was the duty of a Court, if they could do it, to find out some lawful origin, which did not infringe upon the general principle of law, to support such a right. Lord Selborne eventually decided the case upon the ground that the Court ought to hold that the original grant to the corporation, which was evidenced by the prescriptive user they had proved by themselves and their lessees of the several fishery, must have contained, if it could have been exhibited, a condition in favour of the free inhabitants and ancient burgesses. Lord Selborne remarks that he is unable to discover any reason why this should not be a good foundation in law for the right which the appellants claimed: "If an actual grant so qualified were produced, it would be immaterial whether the word used in it were 'trust,' 'intent,' 'purpose,' 'proviso,' or 'condition,' or whether the trust or duty imposed on the mayor and free burgesses, were cognizable in equity only, or also at law. In such a grant there would be all the elements necessary to constitute what in modern jurisprudence is called a charitable trust. 'If I give' (said Lord Cairns in the *Wax Chandler's Case* (1)) 'an estate to A. upon condition that he shall apply the rents for the benefit of B., that is a gift in trust to all intents and purposes.' A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust; and no charitable trust can be void on the ground of perpetuity." And Earl Cairns adds: "There were several questions argued both here and in the Court below; and I think it desirable to mention them for the purpose of explaining that I should be very far from attempting to call in question the law as applicable to those questions. In the first place, I agree with the view of

(1) Law Rep. 6 H. L. 21.

the Common Pleas Division that the free inhabitants of ancient messuages in Saltash cannot be presumed to be incorporated so as to be capable of prescribing for a profit à prendre in alieno solo. In the next place, I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a profit à prendre in alieno solo. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a profit à prendre in alieno solo, and indeed cannot be the grantee either of a several fishery or any other kind of real property. Upon all these questions, therefore, nothing that I am going to say will raise or suggest any kind of doubt." He then goes on to say that notwithstanding this he must assume a lawful origin, if he can, for the immemorial usage proved, and the lawful origin which he finds for it is that there must have been in the original grant to the corporation of Saltash a condition in favour of the inhabitants of these ancient messuages. Now, applying that principle to this case, it seems to me that I ought to presume, if it be possible, a person competent to make and a person competent to take a grant. Here it is clear there is a possible grantor. The lord of the manor at the time of the inclosure might have granted the right to a trustee for the benefit of the parish if he had thought fit. That indicates the possible grantee that I think I ought to presume—a trustee for the benefit of the parish. If the corporation of Saltash could take a several fishery clothed with a trust for an indeterminate body of inhabitants, why may not I assume that a possible grantor, such as the lord of the manor would be, or such as the freeholders of these open common fields would be, could grant the land for an indeterminate body through the intervention, be it of the churchwarden or overseers or anybody who could hold for the benefit of the parish?

It is pointed out in the *Saltash Case* (1) that gifts for the benefit of the inhabitants of a parish are common enough: they are charitable trusts. They cannot be given to the inhabitants, but they may be given to some person for the benefit of the inhabitants.

(1) 7 App. Cas. 633.

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In this case I, therefore, see no difficulty in presuming first of all that either the lord of the manor, or some other person who could do it, made a grant, which cannot now be produced, in favour of some person who could lawfully hold the property; and the terms upon which it has been holden have been for the benefit of the inhabitants of the parish. I should have arrived at this conclusion quite independently of the case to which I am now about to refer, and I think that in arriving at it I am offending against no rule of law. It is a singular circumstance, that there is another piece of land called the town piece mentioned in the award map, which is apparently a part of a field belonging to the then lord of the manor. This town piece has been used by the parish ever since the date of the award, without interruption or obstruction, and that certainly looks very much as though the lord of the manor had been at the time of the award dealing with the parish in the sense of parting with some of his rights to some trustee for the benefit of the parish itself. But I ought to say that I am by no means bound to entertain a confident belief in my own mind as to whether the lord of the manor made the grant, or whether the freeholders of the open fields made it. What I am bound to do is to say, where the evidence warrants such a finding, that *some one* competent to do it actually did make a grant of this description for the benefit of the parish.

If authority be wanted to support this view, it is to be found in the case of the *Attorney General* v. *Lord Hotham* (1), where the facts were very similar indeed to the facts with which I have had to deal in this case. It was proved there that from the year 1710 the land in question, called the Hale, had been uniformly dealt with as the separate property of the parish, and the Master of the Rolls in giving his judgment in the case says: "Very high judges have said they would presume anything in favour of a long enjoyment and uninterrupted possession. Suppose this case was now submitted to the consideration of a jury, and the parliamentary survey and the court rolls of the manor were produced to shew that these lands belonged to the Crown, and no other evidence was produced to prove that fact; and, on the part of the parish, the parish books were produced containing these

(1) 1 Turn. & R. 209.

different entries, and it was proved that the parish had been in the quiet enjoyment and uninterrupted possession of this property for 110 years, would not that be conclusive? Is not sixty years' possession a title against the Crown? Is not 110 years' possession sufficient to put an end to any claim as to this property? We must suppose that persons who have a right to property will assert that right, and if they lay by for 110 years, and suffer the property to be enjoyed by other persons, that enjoyment must constitute right. I cannot have the least hesitation in saying, that whatever may have been the origin of the possession of these lands by the parish, that possession, coupled with the circumstance that the party who it is said is entitled has been standing by and making no objection to the property being enjoyed as the separate property of the parish, must decide the question; and that we must consider these lands as having been originally granted to trustees for the benefit of the parish, and to be enjoyed by them as their separate exclusive property."

Now, apply that case to the present one. There reliance was placed as confirmatory of the plaintiff's case upon a parliamentary survey and the court roll of the manor, and upon the part of the parish 110 years' user was proved: here reliance is placed by the plaintiff upon an alleged title he has as lord of the manor of Tetney. Assume that he has made out that title primâ facie, or has made out his title as one of the commoners of the fields, the case is a distinct authority for displacing any such primâ facie title. One inference, according to the Master of the Rolls, and one inference only, can be drawn from 110 years' user and possession on the part of the parish, namely, that the lands must have been granted to the trustees for the parish to be enjoyed by them as their separate and exclusive property. [The learned judge then dealt with the provisions of the Act as to the prohibition of grazing by sheep, and came to the conclusion that they were temporary.]

Then it was said that this is a charitable trust, and the *Attorney General* v. *Lord Hotham* (1) does not apply, because, in that case the usage relied upon by the Master of the Rolls commenced in 1710, long before the passing of the 9 Geo. 2,

(1) 1 Turn. & R. 209.

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c. 36, the Charitable Uses Act, according to which a deed of the kind of which I am now presuming the loss ought to have been enrolled; and it has been said that no instance exists of the enrolment of a lost deed being presumed. The authorities quoted upon this point, however, did not satisfy me that they went quite the length which is suggested. I think they do decide that if you have got an actual deed you ought not to presume the enrolment of it, for the obvious reason, that, unless there be a gap in the records, the enrolment ought to appear, but that does not apply to the case of a lost deed. When dealing with a lost deed, you do not know in what part of the rolls to look, and I therefore do not see why in such a case, if I am to presume a lost deed, I should not also presume that the record of the enrolment has disappeared.

I think I have now been through all the points upon one side and the other with reference to the lord of the manor, and the result I have come to with regard to him is that he has no title whatever to maintain this action, and even if he had made out a primâ facie title, the answer of the defendant is sufficient to displace it.

[The learned judge then dealt with the case of the plaintiff Baxter, and gave judgment generally for the defendant.]

The plaintiffs appealed.

1893. March 18. *Sir H. Davey, Q.C., H. D. Greene, Q.C.* (*A. J. Ashton*, with them), for the plaintiffs. The plaintiff Haigh, as lord of the manor, is the owner of all the soil of the manor which is not shewn to belong to any one else, and further, being the owner of the land on both sides of the lane, he must be presumed to be the owner of the soil of the lane. There is nothing to rebut these presumptions. The defendant shews no right to pasture sheep and cattle in the lane, for there cannot be a grant to the inhabitants of a parish. There cannot be a custom for inhabitants as such to have a profit à prendre in the soil of another: *Gateward's Case* (1); *Lord Rivers* v. *Adams* (2), and there is no authority for presuming a grant to an unknown trustee for persons to whom a grant could not legally be made. *Goodman* v. *Mayor of Saltash* (3) and *Attorney General* v. *Lord*

(1) 6 Rep. 59 b. (2) 3 Ex. D. 361. (3) 7 App. Cas. 633.

Hotham (1) do not apply to such a case as the present one. Here there was neither a grantor capable of making the supposed grant, nor a grantee capable of accepting it.

If it is suggested that there was a conveyance to a trustee for a charitable purpose, it would be void under 9 Geo. 2. c. 36, unless it was enrolled, and such an enrolment ought not to be presumed: *Doe* d. *Howson* v. *Waterton* (2); *Wright* v. *Smythies.* (3) The argument that, the grant being lost, it is impossible to know where to look for the enrolment, will not avail, for the time at which the supposed grant was made must be known within a year or two; and even if this were not so it is a mere question of the time required to search the whole roll. The existence of a deed which would be void if not enrolled ought not to be presumed. The vestry had no title to let the land for any purpose, their alleged title being an impossible one at law, and, consequently, the sheep were trespassing, and the plaintiff Baxter can recover.

Channell, Q.C., and *R. Younger*, for the defendant, were not called on to argue as to the claim of the plaintiff Haigh as owner of the soil of the lane. This is not a claim to a profit à prendre, but a claim to the land. There is no difficulty in law in property belonging to a parish. The statute 59 Geo. 3, c. 12, s. 17, vests in churchwardens and overseers of a parish all lands belonging to such parish; and the cases shew that the Act deals with all property belonging, in the popular sense, to a parish, *Doe* d. *Jackson* v. *Hiley* (4); *Doe* d. *Higgs* v. *Terry.* (5) This land is shewn to have been the property of the parish in a popular sense, and a grant to trustees for the inhabitants of the parish must be presumed in order to account for the long possession. The same principle of presumption must be applied to the enrolment of the presumed grant. If there was no enrolment that should have been proved by the plaintiffs: *Doe* d. *Griffin* v. *Mason* (6); *Doe* d. *Lewis* v. *Bingham* (7); *Macdougall* v. *Purrier.* (8)

(1) 1 Turn. & R. 209.
(2) 3 B. & A. 149.
(3) 10 East, 409.
(4) 10 B. & C. 885.
(5) 4 A. & E. 274.
(6) 3 Camp. 7.
(7) 4 B. & A. 672.
(8) 2 Dow & Cl. 135.

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The vestry have been in possession of this land through their tenants, and the Statute of Limitation applies to bar any claim by the plaintiff Haigh to the ownership of it, which is practically vested in the parish.

Sir H. Davey, Q.C., in reply.

Cur. adv. vult.

1893. April 24. The judgment of the Court (Lord Esher, M.R., Lindley and Lopes, L.JJ.) was read by

LINDLEY, L.J. This is an appeal by the plaintiffs from a judgment of Charles, J., dismissing their action. The plaintiff Haigh is the lord of the manor of Tetney in Lincolnshire. The plaintiff Baxter is a tenant of his. The object of the action is to have it declared that the soil of a certain lane called Westfield Lane belongs to the lord of the manor, and to prevent the defendant from turning sheep into the lane. The plaintiff Baxter claims damages for injury done by the sheep getting out of the lane into his fields which adjoin it. The defendant claims a right as lessee of the vestry of the parish to turn sheep and cattle into the lane. No question is raised as to cattle; the dispute is confined to the sheep.

The appeal involves two main questions, viz., first, to whom does the soil in the lane belong? And, secondly, supposing the lane to belong to the parish, is the defendant entitled to graze sheep in it? The first of these questions is the principal one, and the cost of this litigation is mainly attributable to the claim made by the lord to the ownership of the lane. But even if he fails in his claim to the soil of the lane, it will not follow that the action ought to be dismissed; for the plaintiffs may be right in their contention that sheep ought not to be turned into the lane, and that the defendant is liable for the damage done by them to the plaintiff Baxter's land and crops.

Westfield Lane was set out as a public highway by the commissioners appointed by the Tetney Inclosure Act, 1774 (14 Geo. 3, c. 33). This highway as set out was sixty feet wide. It was for many years all grass; but for the last twenty years or more it has been metalled in the middle, the sides being still grass. It ran between allotments made by the same com-

missioners, and the owners of these allotments were bound by the Act, and the award made under it, to make and for ever maintain sufficient ditches and fences on those sides of the allotments which adjoined and abutted on the highway. There are grass banks of some size on each side of the lane, and fences or hedges on the banks.

There is no evidence to shew to whom the soil of this lane belonged before it was set out by the Inclosure Commissioners. The land over which the highway runs was, and is, within the manor of Tetney; but the way appears to have been set out over land called Westfield, which is alluded to in the award as a commonable place, and which the steward of the manor says comprised some 900 acres. To whom the soil of this Westfield belonged before it was allotted by the commissioners is by no means clear. But if Westfield was, as it appears to have been, what is called a common field, the soil would not be in the lord of the manor, but in the respective owners of the strips of land composing it. Moreover, if Westfield was, as it appears to have been, what is called in the Inclosure Act an open field, the recital in the Act leads to the inference that the soil did not belong to the lord of the manor; for the open fields are omitted from the lands, the soil of which is mentioned as belonging to him.

Having regard to the fact that the allotments to the lord and to the owners of the common fields and to the commoners were expressly made in satisfaction of all their respective former rights not expressly reserved to them, the soil in the lane set out would not remain in its former owners, but would primâ facie pass to the allottees of the land abutting on the lane; the allotments on each side extending to the middle of the lane, although described as bounded by the lane.

Be this as it may, and whatever doubt there may be as to the ownership of the soil of the lane before it was set out by the Inclosure Commissioners, the evidence before the Court clearly proves two things, viz., first, that from 1778 down to the present time the lane has been let by the vestry of the parish every year to persons who have paid for the hire of it, and have depastured it; and, secondly, that until 1891 neither the lord of the manor nor any one else has ever questioned the right of the

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vestry to let the lane, or the right of their tenant to depasture sheep and cattle in it.

The parish books shew exactly what has in fact been done with the lane. Under date March 24, 1788, there is the following entry: "The following property belonging to the parish were this day let—all to quit at old Lady Day, 1789," and among the properties enumerated Westfield Lane appears. Similar entries occur on other occasions, e.g., April 11, 1803. The oral testimony shews that the lanes set out by the commissioners were let by auction, by the instructions of the vestry, shortly after Easter in each year, to the highest bidders, who paid for one year's hire of them at the time of letting. The money was paid to the surveyor of highways and was applied for various parish purposes: some of it went to pay for catching moles and sparrows, some for cleaning ditches; the balance generally went to the highway fund, but it sometimes went to the poor rate fund. None of the rent money was ever paid to the churchwardens as such, nor was any of it ever applied to any ecclesiastical purpose.

The conditions of each year's letting were mentioned at the time of letting, and are to be found in the parish books, and were not always the same. Sometimes a money penalty was imposed for the breach of the conditions; sometimes the penalty was forfeiture of the letting. These penalties, however, were seldom if ever enforced. The books shew that these lanes were claimed to be and were used and enjoyed as parish property. The vestry by their tenants occupied and enjoyed the lanes as land belonging to the parish. They did not claim or enjoy a mere easement, nor a profit à prendre over land belonging to someone else. Such an enjoyment for so long a period is only consistent with ownership of the soil. The true and necessary conclusion from the facts is, that the soil of the lane is not in the lord of the manor, nor in the owners of the adjoining allotments, but is and has been for many years vested in some person or persons as trustees for the parishioners. This was the conclusion at which Charles, J., arrived; and he was quite right: see *Attorney General* v. *Hotham.* (1)

The churchwardens and overseers of a parish are, by 59 Geo. 3,

(1) 1 Turn. & R. 209.

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c. 12, s. 17, official trustees, empowered to "accept, take, and hold in the nature of a body corporate, for and on behalf of the parish," all lands belonging to the parish, in the popular sense of that expression. *Doe* d. *Jackson* v. *Hiley* (1) and *Doe* d. *Higgs* v. *Terry* (2) shew that all lands which in 1819 belonged to the parish of Tetney in a popular sense were vested by the Act in the churchwardens and overseers of that parish; and the lane in question must be taken to have either vested in them in 1819, or to have been acquired by them since. It was, indeed, contended by the counsel for the appellant that it was impossible to come to such a conclusion, inasmuch as by 9 Geo. 2, c. 36, s. 3, there could be no grant to trustees for a parish without enrolment, and that although a lost grant might be presumed its enrolment could not. Neither of these propositions is, however, true to the extent necessary to support the argument. In the first place, there are various Acts of Parliament, e.g., the early Church Building Acts, which enabled grants of land to be made for some charitable purposes without enrolment, and a grant may well have been made for some of these purposes, and the purpose itself may have been lost sight of. In the next place, it is by no means clear that after such a long enjoyment as is proved in this case, and in the absence of proof of non-enrolment, an enrolment if necessary ought not to be presumed. *Wright* v. *Smythies* (3) and *Doe* d. *Howson* v. *Waterton* (4) on the one side must be contrasted with *Attorney General* v. *Moor* (5) and *Macdougall* v. *Purrier* (6) on the other.

But apart from all presumptions the parish have in our opinion gained a title to these parish lanes by the Statute of Limitations. The vestry have by their tenants occupied and enjoyed the lanes for more than a century, and this occupation and enjoyment is that of the churchwardens and overseers acting through the vestry. We see no legal difficulty in the acquisition by the churchwardens and overseers of a title by the Statute of Limitations, although, of course, the title so acquired must be subject to the public right of way.

So far, therefore, as the ownership of the lane is concerned, we

(1) 10 B. & C. 885.
(2) 4 A. & E. 274.
(3) 10 East, 409.
(4) 3 B. & A. 149.
(5) 20 Beav. 119.
(6) 2 Dow & Cl. 135.

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are of opinion that it belongs to the parish, and is legally vested in its churchwardens and overseers by virtue of the statute 59 Geo. 3, c. 12, s. 17, already referred to.

Moreover, having regard to the fact that the lane has been let every Easter for a year, and bearing in mind that land may be let for a year by parol only, the proper conclusion respecting the defendant's interest in the lane is that he had a lease of it for a year, subject to the rights of the public in respect of the highway over it. From the conclusion thus arrived at it further follows that the defendant's sheep were not trespassing in the lane even if the defendant broke the conditions of his lease by putting sheep there. The lessee of a piece of land cannot be a trespasser on it. The entry in the parish book shews that it was one of the terms of his lease that he should not put sheep in the lane; but this was a matter which concerned no one except himself and the vestry. If the vestry did not care to enforce the condition by forfeiting his lease, no one else could treat his sheep as trespassing in the lane. Unless the Inclosure Act prohibited the owner of the lane from turning sheep into it, the plaintiffs' rights would not be infringed by the defendant turning his sheep into the lane, even contrary to his lease. As between the plaintiffs and the defendant, the sheep were rightfully depasturing in the lane, and if they trespassed on the plaintiff Haigh's lands it was the plaintiff's own fault for not keeping up his fences as by the award he was bound to do.

[The judgment then dealt with the construction of that part of the Inclosure Act which prohibited the keeping of sheep in the highways and byeways set out by the commissioners, and continued:—] Upon this part of the case and having regard to the various provisions of the Act and to the award we have come to the same conclusion as Charles, J., viz., that the statutory prohibition was temporary only.

The plaintiffs are therefore wrong on all points, and their appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Deacon, Gibson, & Medcalf, for Grange & Wintringham, Grimsby.*

Solicitor for defendant: *Ernest H. Wyles, for John Barker, Grimsby.*

A. M.

IN RE THE TITHE ACT, 1891. ROBERTS *v.* POTTS.

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April 26;
May 6.

Tithe Rent-charge—Rating of Owner of Tithe Rent-charge—Tithe Act, 1891 (54 & 55 *Vict. c.* 8)—*Arrears of Rates due before passing of Act—Deduction of, from Tithe Rent-charge accruing after Act—Repeal—Saving of existing Rights and Liabilities.*

By s. 6 of the Tithe Act, 1891: "Any rate to which tithe rent-charge is subject shall be assessed on, and may be recovered from the owner of the tithe rent-charge . . . . and so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed."

At the date of the passing of the said Act, certain rates upon a tithe rent-charge, of which the appellant was the owner, were due and in arrear, owing to the neglect of the overseers to demand payment thereof from the occupiers of the lands out of which the tithe rent-charge issued. The tithe rent-charge for the period in respect of which the said rates were due had been paid to the appellant in full. After the passing of the Act the overseers, purporting to act under s. 8 of the Tithe Act, 1837, demanded payment of the said arrears of rates from the occupiers of the land, who paid them and were allowed the amount thereof by their landlord, the respondent, out of the half-year's rent becoming due next after such payment. Subsequently thereto a half-year's tithe rent-charge became payable by the respondent, as owner of the land, to the appellant. The respondent claimed to deduct therefrom the amount which he had allowed to the occupiers out of their rent in respect of the said arrears of rates so paid by them:—

Held, that, having regard to the provisions of s. 6 of the Tithe Act, 1891, the payment of the arrears of rates by the occupiers was a voluntary payment which they were not entitled to deduct from their rent, and that the respondent was consequently not entitled to make the deduction claimed from the tithe rent-charge due to the appellant.

APPEAL from the County Court of Denbighshire.

In July, 1892, and for some years previous thereto, the Rev. H. W. Jones was the owner of a tithe rent-charge issuing out of certain lands in the parish of Llanferres, of which the respondent, H. J. Potts, was the owner.

On March 26, 1891, the date of the passing of the Tithe Act, 1891, certain rates upon the said tithe rent-charge, to the amount of 30*l.*, were due and in arrear, owing to the neglect of the overseers to demand payment of them from the occupiers of the land. The tithe rent-charge for the period, in respect of which the said arrears of rates were due, had been paid to Mr. Jones in full. On June 9, 1892, the overseers, purporting to act under

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s. 70 of the Tithe Act, 1836, and s. 8 of the Tithe Act, 1837, demanded payment of such arrears of rates from the occupiers, who paid them and deducted the amount thereof from the next half-year's rent that became due to their landlord, the respondent, claiming to do so under the two last-mentioned sections. On July 1, 1892, a half year's tithe rent-charge, amounting to 85*l.* 4*s.* 2*d.*, became payable by the respondent to Mr. Jones. The respondent paid the sum of 55*l.* 4*s.* 2*d.*, but claimed to deduct the balance of 30*l.*, as being the amount allowed by him to his tenants on account of the rates so paid by them. The appellant, as agent for Mr. Jones, thereupon applied to the county court, under s. 2 of the Tithe Act, 1891, for an order for the recovery of the balance of 30*l.* The county court judge dismissed the application. The applicant appealed.

Danckwerts, for the appellant. Prior to the Tithe Act, 1891, the law was that rates on tithe rent-charge might be recovered from the occupiers of the lands, who were entitled to deduct the amount from the rent due to their landlord, who in turn could deduct it from the next payment due from him to the owner of the tithe rent-charge (6 & 7 Will. 4, c. 71, s. 70, and 7 Will. 4 & 1 Vict. c. 69, s. 8). But the Act of 1891 altered the procedure for the recovery of such rates. They are now, by s. 6 of that Act, recoverable only from the owner of the tithe rent-charge. Sect. 70 of 6 & 7 Will. 4, c. 71, and s. 8 of 7 Will. 4 & 1 Vict. c. 69, are repealed thereby, and also by 54 & 55 Vict. c. 67.

The overseers in the present case failed to put in force the procedure against the occupiers until after that procedure had been abolished. The payment, therefore, by the occupiers was a voluntary payment, which cannot be deducted from the tithe rent-charge due to the parson. The only remedy for the recovery of rates on tithe rent-charge is that given by the Act: *Lamplugh* v. *Norton*. (1)

Colt Williams, for the respondent. Under the former law the occupier was only liable to pay the rates on tithe rent-charge in the event of the tithe owner not paying. Though there may

(1) 22 Q. B. D. 452.

have been no remedy against the tithe owner by the overseers for the recovery of the rates, yet he was the person who ought to pay them. It was by his default, therefore, that the rates were in arrear at the time of the passing of the Act, and he ought not now to claim to have his tithe in full and resist the deduction of money which has been paid on his account.

The payment of the rates by the occupiers was not voluntary, for the old procedure, notwithstanding the repeal, was still alive so far as related to the recovery of rates accrued due before the passing of the Act of 1891. The Interpretation Act, 1889 (52 & 53 Vict. c. 63) provides in s. 38 that where any future Act repeals any other enactment, the repeal shall not, unless a contrary intention appears, (*c*) affect any obligation or liability accrued under the repealed Act, nor (*e*) affect any remedy in respect of such obligation or liability. Here there was an obligation accrued under the repealed sections on the part of the tenants to pay the rates, and on the part of the tithe-owner to allow such payment to be deducted from his rent-charge.

Danckwerts, in reply. The case of *Andrew* v. *Hancock* (1) shews that s. 8 of the Act of 1837 must be put in force in the current half-year and not afterwards.

Cur. adv. vult.

May 6. The judgment of the Court was delivered by

Bruce, J. In this case the owner of a tithe rent-charge claimed payment of the rent-charge for the period of six months, which became payable on July 1, 1892, and amounted to 85*l.* 4*s.* 2*d.* 55*l.* 4*s.* 2*d.*, part thereof, has been paid, and the dispute arises in respect of a balance of 30*l.*, which the defendant, who is the owner of the land out of which the rent-charge issues, claims to deduct in respect of rates which have been paid by the occupiers. It is difficult to gather from the notes of the learned judge of the county court when these rates accrued due, but it is admitted that they accrued due sometime prior to March 26, 1891, the day on which the Tithe Act of 1891 came into operation. It seems probable, from what was said to us in the course

(1) 1 B. & B. 37.

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of the argument, that a greater portion of these rates accrued due long before March 26, 1891. For some reason that is unexplained, the rates were allowed to remain unpaid by the occupiers, and no proceedings were taken to enforce payment under s. 70 of the Tithe Act, 1836, or under s. 8 of the Tithe Act of 1837, until June, 1892, when some notices, the terms of which do not appear from the judge's notes, were served upon the occupiers. The notices, we gather, are assumed to have been given in accordance with s. 8 of the Act of 1837. The broad question we have to decide is whether the new procedure for enforcement of the tithe rent-charge introduced by the Act of 1891, is to be construed as subject to the machinery of the older Acts. We think it was intended under the Act of 1891, to introduce an entirely new procedure for the recovery of tithe rent-charge; and indeed to create a new liability upon the owner of lands, and that it is not possible to apply the old procedure to the new Act, except in cases where the new Act itself has expressly referred to and incorporated the provisions of the former Acts. Sect. 6 of the Act of 1891, provides that any rate to which the tithe rent-charge is subject shall be recovered from the owner of the tithe rent-charge; but there is no provision in the Act rendering the tithe rent-charge, made by the Act payable by the owners of the land, subject to the rates which may have been allowed to fall into arrear before the passing of the Act. Indeed, there is an express provision in the last-mentioned section repealing so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier.

Therefore, when on June 9, 1892, the notices were served on the occupiers, even if these notices complied with the provisions of s. 8 of the Act of 1837, as the provisions of that section had ceased to be operative at the time the notices were served, the service of the notices and the subsequent payment of the rates by the occupiers, cannot, we think, operate to entitle the occupiers to deduct the amount of the rates from their rent, or the present defendant to deduct it from the tithe rent-charge due to the applicant. It seeme to us unnecessary to consider whether the notices complied with the terms of s. 8 of the old Act;

but, having regard to the terms of the section which require the notice to be given to the occupier twenty-one days previous to any of the half-yearly days of payment of the rent-charge, and having regard to the terms of s. 70 of the Act of 1836, which confers power upon the occupier to deduct the rate from the rent next payable, we entertain some doubt, even if the 8th section had remained in force, whether rates which had become due in respect of the tithe rent-charge, payable in one year, could be deducted from the tithe-charge payable in a subsequent year or years.

It was contended before us that notwithstanding the provisions of s. 6 of the Tithe Act, 1891, repealing so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier, such Acts must be taken by virtue of the 52 & 53 Vict. c. 63 (the Interpretation Act, 1889), s. 38, to be kept alive so far as is necessary to preserve existing rights. We doubt whether the general provisions of the Interpretation Act can, consistently with the context of the Act of 1891, be read into it so as to override the special provisions therein contained. But even if the Interpretation Act of 1889 is to be taken as modifying the Act of 1891, the provisions of the Interpretation Act do not seem to provide for the present case. Under the old law there was no right on the part of the occupier to deduct the rates from his rent, or on the part of the landlord to deduct them from payments due to the owner of the rent-charge, until certain events had happened. In the present case until the notices were given or some steps taken to enforce payment of the rates by the occupiers, there could not be even an inchoate right on the part of the occupiers to deduct the rates they had not paid from payments due to the landlord or to anyone else. As no notice was given nor steps taken to demand the rates from the occupiers until long after the passing of the Act of 1891, there were no existing rights to be preserved by the saving clause in the Interpretation Act.

We have thought it right to consider this matter in some detail, and have given the reasons which lead us, on the strict construction of the Acts of Parliament, to the conclusion we have come to. But we may say that we think it is to be gathered

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from the present scope of the Act of 1891, that it was the intention of the legislature to institute an entirely new method for the recovery of the tithe rent-charge—that it never could have been intended to work the old and the new machinery together, and we think it would introduce confusion if questions relating to matters arising under the old law were allowed to be mixed up with matters arising under the provisions of the new Act.

Therefore, in our opinion, we think the decision of the learned judge below was wrong, and that an order ought to be made for the recovery of the 30*l.*

Appeal allowed.

Solicitors for appellant: *Chappell & Griffith.*

Solicitors for respondent: *Philpot & Son, for Potts & Co., Chester.*

J. F. C.

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April 11; *May* 15.

THE GUARDIANS OF THE POOR OF THE LLANELLY UNION, APPELLANTS; THE GUARDIANS OF THE POOR OF THE NEATH UNION, RESPONDENTS.

Poor Law—Derivative Settlement—Child under Sixteen—Second Marriage of Mother—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

Under the 35th section of the Divided Parishes Act, 1876, as interpreted by the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (14 App. Cas. 465), the children under sixteen years of age of a first marriage do not follow the settlement derived by their mother from a second husband.

CASE stated by the Court of Quarter Sessions for the county of Caermarthen. The question raised was whether the Court was right in quashing an order for the removal of Margaret Anne Thomas, Thomas Thomas, and Maria Thomas, the children under sixteen years of age of Elizabeth Wallace by Henry Thomas, her former husband, from the parish of Lougher in the Llanelly Union in the county of Caermarthen, to the Neath Union in the county of Glamorgan, which contained the parish of Briton Ferry, the place of settlement of Richard Wallace, the husband of Elizabeth Wallace.

Macmorran, for the appellants. The question depends upon the effect of the construction given by the House of Lords to the 35th section of the Divided Parishes Act, 1876 (1), in *Guardians of Reigate Union* v. *Guardians of Croydon Union.* (2) The judgment of Lord Watson decides (3) that the third clause, which prohibits inquiry into the derivative settlement of a parent, does not apply to the case of children under sixteen. The decisions in *Keynsham Union* v. *Bedminster Union* (4), and *Guardians of Poor of Amersham Union* v. *Guardians of Poor of City of London* (5), which proceed upon the contrary assumption, are therefore overruled. In *Guardians of Poor of West Derby Union* v. *Guardians of Poor of Atcham Union* (6), the Court of Appeal held that under the section, as interpreted by the House of Lords, a child under sixteen took the settlement derived by its mother from her father. There is no distinction between derivative settlements, and it follows that the children under sixteen of a woman's first marriage take the settlement which their mother derives from a second husband.

S. T. Evans, (*Channell, Q.C.*, with him), for the respondents, relied on the passages in the judgments of Lords Watson and Macnaghten in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (2), which are cited in the judgment of the Court.

Macmorran, in reply.

Cur. adv. vult.

(1) By the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

"An illegitimate child shall retain the settlement of its mother, until such child acquires another settlement."

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(2) 14 App. Cas. 465.

(3) 14 App. Cas. 465, at p. 484.

(4) 3 Q. B. D. 344.

(5) 20 Q. B. D. 103.

(6) 24 Q. B. D. 117.

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GUARDIANS OF LLANELLY UNION v. GUARDIANS OF NEATH UNION.

May 15. The judgment of the Court (Pollock, B., and Kennedy, J.) was read by

KENNEDY, J. By an order of two of the Caermarthenshire magistrates in petty sessions, Elizabeth Wallace and her six children, four of them being the issue of her first marriage, and the two youngest the issue of her second marriage, were removed from the parish of Lougher in the Llanelly Union to the Neath Union, which includes the parish of Briton Ferry, the place of settlement of her second husband. An appeal against this order was heard at the quarter sessions, and the Court, whilst otherwise confirming the order of the justices, allowed the appeal of the Neath Union, and quashed the order in respect of the three eldest children of Elizabeth Wallace by her first husband, all of whom were under sixteen years of age. The fourth child of the first marriage was within the age of nurture. The Llanelly Union appealed to this Court, and the question upon the case stated for our determination is, whether or not the three eldest children of Elizabeth Wallace by her first husband follow the settlement derived by Elizabeth Wallace on her marriage with her second husband. If they do, the order of the justices removing them, as well as Elizabeth Wallace and her younger children, to the Neath Union, which the sessions quashed, was rightly made.

It was not, and could not, in our judgment, be disputed that, prior to the decision of the House of Lords in the case of *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1), it was settled law that the children of a first husband did not follow the settlement derived by their mother upon a second marriage. The law was so laid down, before the passing of the Divided Parishes Act, 1876, in *Rex* v. *The Inhabitants of Walthamstow* (2), and, since the passing of that Act, in *Keynsham Union* v. *Bedminster Union* (3) in 1878. Illegitimate children, on the other hand, did follow the settlement derived by their mother on a marriage: *Reg.* v. *The Inhabitants of St. Mary, Newington.* (4) It was, however, contended, on behalf of the Llanelly Union, that these earlier decisions were impliedly overruled by the House of Lords in the case above referred to, and

(1) 14 App. Cas. 465.
(2) 6 A. & E. 301.
(3) 3 Q. B. D. 344.
(4) 4 Q. B. 581.

especial stress was laid upon portions of the reasoning in the judgment of Lord Watson. It becomes necessary, therefore, to see carefully what that case did decide, so far as the construction of the 35th section of the Divided Parishes Act, 1876, which was adopted by the House of Lords, bears on the present question.

Undoubtedly it establishes, contrary to some of the earlier decisions of the Courts upon the interpretation of that section, that the words relating to a child under the age of sixteen, that it "shall take the settlement of its father or of its widowed mother, as the case may be," do not mean that, on the death of the husband, the wife at once reverts to her maiden settlement, to which her children in nonage also would become chargeable; but that the true meaning is that, after the death of the husband, his widow retains, and consequently the children of the marriage under sixteen also retain, the settlement which she has derived from the marriage; and that the expression "or of the widowed mother, as the case may be" refers to the rule in the law, existing prior to the Act of 1876, that, upon the death of a father, unemancipated children take the benefit of any primary settlement which the widowed mother may acquire for herself.

Upon the strength of this decision it was argued that, though the settlement, which the mother in the present case acquires from her second marriage, is one which she gets, not by virtue of her widowhood, but by virtue, truly, of her second wifehood, it still is a settlement which the children of the first marriage follow, because it is a settlement which she has acquired whilst she is "quoad the children," to use the phrase of counsel, a "widowed mother." It appears, however, to us that a settlement, which a widow derives upon marriage from a second husband, is not a settlement which falls within the meaning of Lord Watson's expression "a primary settlement which the widowed mother may acquire for herself" (1), or within the parallel expression of Lord Macnaghten, "acquires in her own right." (2) We are unable to concur in the suggestion that, because, as the House of Lords has decided, it is not to be inferred from the use of the words "wife" and "widowed mother" in the 35th section that they are used in contrast, so

(1) 14 App. Cas. 483. (2) 14 App. Cas. 489.

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Kennedy, J.

as to indicate that a widow loses, and consequently her unemancipated children lose, the settlement of her dead husband, it ought to be inferred, as a matter of logical sequence, that when the section speaks of the child under sixteen taking the settlement of its widowed mother, it means to include a settlement gained by the mother when, and indeed only because, she has ceased to be a widow.

It appears to us that, not only is there nothing in the authoritative interpretation placed by the House of Lords upon the 35th section which implies a view antagonistic to the decisions which have been referred to, as establishing that children of a first marriage do not follow the settlement derived by their mother from a second husband; but, on the contrary, that, in the language of Lord Watson and of Lord Macnaghten, there is strong support for the maintenance of that rule. Lord Watson states precisely wherein, and wherein only, the law applicable to parentage settlements has been changed by the 35th section. He says "So far as it concerns the settlement of lawful children, the change introduces a very important alteration of the law. It puts an end to all nice questions as to emancipation or non-emancipation, by enacting that, on attaining the age of sixteen, every child shall, without regard to its physical or mental capacity, cease to follow its parent's settlement, and become capable of acquiring a settlement in its own right. The clause leaves the old law applicable to parentage settlements unchanged in all other respects." (1) Lord Macnaghten states that the words of the second exception in the 35th section, "in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another," "are, apart from the rule laid down by the Court of Appeal in *Reg.* v. *The Guardians of Bridgnorth*" (2), of which the House of Lords disapproved, "reasonably plain, and, notwithstanding that rule, were rightly construed by Lopes, L.J., in delivering the judgment of the Court in the case of *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-*

(1) 14 App. Cas. 482, 483. (2) 11 Q. B. D. 314.

on-Severn Union." (1) (2) In that case the pauper was the child by a first marriage of a mother who afterwards married again. The law is stated by the Lord Justice in these terms: "The father died in 1868. Up to that time she (the pauper child) took his settlement, which was in Wanborough, in the appellant union, which settlement she would retain up to sixteen, unless her mother in the interval, whilst a widow, acquired a settlement in her own right, when she would take that settlement up to sixteen, and retain it until she acquired another. The mother never acquired a settlement in her own right. She was twice married, and would on each occasion take her husband's settlement. Under the law before the Divided Parishes Act, the mother's settlement so acquired would not have been communicated to the pauper, and under the 35th section of the statute the same result, in our opinion, follows, because on the second marriage of the pauper's mother she ceased to be a widowed mother, and consequently her settlement by such second marriage would not be communicated to her child. Therefore, under the provisions contained in s. 35, the pauper would retain her father's settlement in Wanborough until she acquired another." (3) In our judgment, therefore, the case of the Llanelly Union, that these three children of the first marriage ought to follow the settlement in the parish of Briton Ferry in the Neath Union, acquired by their mother on her second marriage, fails.

Judgment for the respondents.

Solicitors for appellants: *Andrew, Wood & Co., for Rees & Edwards, Llanelly.*

Solicitors for respondents: *Bell, Brodrick, & Gray, for Cuthbertson & Powell, Neath.*

(1) 20 Q. B. D. 597. (2) 14 App. Cas. 489.
(3) 20 Q. B. D. 605.

H. D. W.

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May 8.

COOLE, APPELLANT; LOVEGROVE, RESPONDENT.

Metropolis—Buildings Acts—Erection of New Buildings—Notice—Exemption—Canal Company—Buildings "used for the purposes of" a Canal—Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 6, 38.

By the Metropolitan Building Act, 1855, s. 38, two days before any building is commenced, a notice in writing containing specified particulars must be given by the builder to the district surveyor appointed under the Act: and s. 6 exempts from the operation of this part of the Act any building belonging to a canal company, "and used for the purposes of" the canal under the provisions of any Act of Parliament.

A canal company under their statutory powers put up a building upon one of their wharves, the wharf and the building being let by the company to an institution for distributing firewood. The building was used by the tenants as a place in which to chop up firewood. The company were not a carrying company, but took tolls for the passage of barges along their canal, and it was agreed between themselves and their tenants that all the wood required by the latter should be brought to the wharf and building in their barges along the company's canal:—

Held, that the building was not "used for the purposes of the canal" within the meaning of s. 6 of the Metropolitan Building Act, 1855, and therefore that the notice required by s. 38 ought to have been given.

CASE stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

The appellant was summoned to appear before the magistrate at the Clerkenwell police court upon a complaint that the appellant, being the builder engaged in erecting a building situate at No. 38 Graham Street, in the parish of St. Mary, Islington, in the county of London, within the limits of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), did neglect to give to the respondent, who was the district surveyor of the district of South Islington, under that Act, notice in writing two days before such building was commenced, stating the situation, area, height, intended use, and other particulars of the building about to be commenced, contrary to the provisions of the statute.

The appellant was the secretary of the North Metropolitan Railway and Canal Company, a corporation created by statute, and carrying on business under 45 & 46 Vict. c. cclxii., for the purposes therein mentioned. By that statute, the company

acquired and took over the undertaking of the Company of Proprietors of the Regent's Canal, incorporated by 52 Geo. 3, c. cxcv., which statute, and 59 Geo. 3, c. lxvi., and subsequent statutes relating to the Regent's Canal, apply to the North Metropolitan Railway and Canal Company.

The building in question was erected by the North Metropolitan Railway and Canal Company upon a wharf belonging to them, having been constructed by them for the purposes of their business, under powers conferred by 59 Geo. 3, c. lxvi., upon land acquired for their purposes under the same statute. The Philanthropic Firewood Institution were tenants to the company of the wharf. The building was commenced on August 16, 1892, and on its completion was, on September 15, 1892, let at a rent to the institution. The wharf was used by the institution for chopping firewood, and as a general and landing wharf, and the building, a wooden shed about sixty feet long, was erected for the institution, and used by them as a place in which to chop their firewood. There was an understanding between the company and the institution that the firewood should be brought to the wharf and building by means of the canal in barges belonging to the institution. The company received tolls for the passage of the barges over their canal, but they were not a carrying company. No notice under s. 38 of the Metropolitan Building Act, 1855, was given on behalf of the company of their intention to erect the building.

The learned magistrate convicted the appellant, and imposed a penalty upon him under s. 41 of the Metropolitan Building Act, 1855, holding that the building, not being occupied directly by the company, and not being used for the purposes of the canal itself, did not come within the exemption in s. 6 of that Act, and therefore that notice should have been given to the respondent under ss. 38 and 40. (1)

(1) By the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 6, the following buildings and works shall (inter alia) be exempt from the operation of the first part of the Act: "The buildings belonging to any canal, dock, or railway company, and used for the purposes of such canal, dock, or railway, under the provisions of any Act of Parliament."

Sect. 38 (in the first part of the Act) provides for notice in writing, containing certain specified particulars, to be given two days before any

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The question for the opinion of the Court was whether the magistrate was right in law in so convicting the appellant.

C. Mathews, for the appellant. The building in question is a building belonging to the North Metropolitan Railway and Canal Company, and "used for the purposes of such canal," under the provisions of an Act of Parliament, within the meaning of s. 6 of the Metropolitan Building Act, 1855. It is used for the purposes of the canal, because it enables them to earn their tolls in respect of the carriage by the Institution along the canal in their barges of the wood brought to the wharf and building. But for the erection of the shed the company would not get their tolls. The object of s. 38 of the Act of 1855 is to ensure that buildings should be erected under proper supervision. Here the building was in fact erected under the statutory powers of the company, and under the supervision of their engineer. [He cited *North Kent Ry. Co.* v. *Badger*. (1)]

R. Cunningham Glen, for the respondent, was not heard.

POLLOCK, B. This case raises a question of some importance. I cannot, however, doubt that the magistrate's decision was right. By the Metropolitan Building Act, 1855, s. 38, notice is required to be given to the district surveyor before any building can be erected or altered in any important degree. That, of course, is a provision for the protection of the public, and in order to ensure the erection and maintenance of sound and safe buildings. By s. 6 certain places are excluded from the general area amenable to the provisions of the Act, and those exempted places include the area of land which has been taken by any canal, dock, or railway company under the provisions of any Act of Parliament, and used for the purposes of the canal, dock, or railway. The object and intention of the Act is clear. It is that where Parliament has assigned to such companies a certain area of land, they ought to be allowed to deal with that area for the purposes of their Act and of their business without having

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building is commenced by the builder to the district surveyor under the Act; and s. 41 provides a penalty to be imposed upon any builder who neglects to give the requisite notice.

(1) 27 L. J. (M.C.) 106.

new duties, restrictions, or liabilities placed upon them, such as they would be subject to if they came within the provisions of the Metropolitan Building Acts. By the Regent's Canal Company's Act of 1819 (59 Geo. 3, c. lxvi.), the canal company were empowered to make and build "quays, wharves, warehouses, erections, sheds, buildings, and other conveniences adjoining thereto, and all such other works as may be necessary and requisite for rendering the same commodious for the use of such docks and basins, and for the accommodation and convenience of persons resorting with barges and other vessels thereto." The intention of the Act was, not that the Regent's Canal Company should be a carrying company, but that they should be enabled to make and maintain a water highway whereon the barges of other people could come, and also that they should be enabled to construct quays, basins, docks, and buildings, without which the water-way would be comparatively useless. Turning to the Metropolitan Building Act, 1855, the words there will be found to be almost correlative, because the exception is in respect of "the buildings belonging to any canal . . . company, and used for the purposes of such canal." Now, although no doubt any wharf or building, to or from which goods or materials are carried along the water-way of a canal, brings profit to the canal company, it does not follow that the wharf or building is "used for the purposes of" the canal within the meaning of the Act. What has happened here is, I should suppose, what has happened in many other cases. The land which was originally acquired for the purposes of a wharf—that is for the unloading of goods carried on the water-way, whereby the company earned their tolls—is found to be more than is necessary according to the modern use of the canal, and then the company leases the land or wharf to others, and erects buildings upon it in order that a profit may be made, not in the first instance by the company, but by those who take the lease and use the land and buildings for manufacturing and other purposes. In the present case the Philanthropic Firewood Institution take on lease the wharf and building for the purpose of chopping their firewood, but incidentally it is found that by an arrangement between the parties the blocks of wood are conveyed over the canal in the ordinary

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way of the company's business, the effect of the arrangement being that the institution give the company a monopoly in respect of the carriage. That being so, although the building no doubt is an advantage to the company, it cannot, in my opinion, be said to be used for the purposes of the canal. If the building, instead of being a shed used for the comparatively small matter of chopping firewood, was an expensive building put up, with expensive machinery, for the purpose of manufacturing pianos, or a building for the making of expensive china, it could not fairly, I think, be said to be used for the purposes of the company's Act, although in either of those cases the company would earn a profit by what was carried along their canal. It would be wholly beyond the statutory powers of the company to carry on such businesses themselves. I am of opinion that the decision of the magistrate was right, and our judgment should be for the respondent.

KENNEDY, J. I agree. It is sufficient for me to say shortly that, in my opinion, a building used for such a purpose as this, or for purposes of manufacture, is not a building used for the purposes of the canal, merely because the existence of the building makes it probable or certain that the company will gain a profit by reason of the material used being carried along their canal.

Judgment for the respondent.

Solicitors for appellant: *Hollams, Son, Coward, & Hawkesley.*

Solicitor for respondent: *W. A. Blaxland, Solicitor of the London County Council.*

W. A.

LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

1893 *May 8.*

Landlord and Tenant—Distress—Rent payable in Advance if Required—Requirement during Currency of Quarter—Reasonable Notice.

The defendants let a house to a tenant upon a yearly tenancy under an agreement whereby the rent was reserved "payable quarterly on the usual quarter days, and always if required in advance." The tenant granted a bill of sale of his goods in the house to the plaintiffs, who, upon default in payment of the amount secured by the bill of sale, took possession of the goods and fixed a day for their sale. On the morning of the sale, which occurred in the middle of a quarter, the defendants demanded of the tenant, under threat of immediate distress, the rent for the current quarter in advance. The plaintiffs, to prevent the sale from being interrupted, paid the rent under protest, and then brought an action to recover it back:—

Held, that under the above agreement the defendants were entitled to demand the quarter's rent in advance at any time during the currency of the quarter, that in the event of non-payment upon such demand they would under the circumstances of the case have been entitled to distrain m ediately, and that consequently the money paid by the plaintiffs could not be recovered back.

Appeal from the Bloomsbury County Court.

By an agreement in writing, dated July 15, 1891, the defendants let to one Reuben Tew a house, No. 19, Euston Square, upon a yearly tenancy, to commence from July 24, 1891, at a rent of 90*l.* per annum, "payable quarterly on the usual quarter days, and always if required a quarter in advance . . . the first payment, being for two-thirds of a quarter of the said yearly rent, to be made if required in advance on the 24th of July, 1891." Tew entered into possession under the agreement. On July 1, 1892, he executed a bill of sale of his goods upon the premises to the plaintiffs. In November, Tew being in default under the bill of sale, the plaintiffs took possession of the goods and instructed an auctioneer to sell them upon December 8. On the morning of the sale the defendants demanded from Tew the sum of 44*l.* 11*s.* 8*d.*, being one quarter's rent due Michaelmas, 1892, and in arrear, and a further quarter's rent in advance which would in the ordinary course have been payable at Christmas, and threatened immediate distress if the money was not paid forthwith. The plaintiffs in order to prevent interruption

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of the sale paid the money demanded under protest—and then brought an action in the county court to recover back 22*l.* 10*s.*, the amount of the quarter's rent demanded in advance. The county court judge was of opinion that the requirement of the Christmas rent in advance ought to have been made on or before September 29, and could not be made during the currency of the quarter. He accordingly gave judgment for the plaintiffs.

The defendants appealed.

Leigh Clare, for the defendants. The county court judge was wrong. The requirement of the quarter's rent in advance might be made at any time during the quarter. The true construction to be put on such an agreement as this is that the rent is reserved due at the commencement of each quarter, but that the right of distress is suspended until after payment has been required: *Witty* v. *Williams*. (1) The mere suspension of the landlord's remedies until after demand does not prevent the rent from being a forehand rent; per Pollock, C.B., and Alderson, B., in *Williams* v. *Holmes*. (2)

Ernest Pollock, for the plaintiffs. In *Williams* v. *Holmes* (2) the Court expressly refrained from deciding the point now raised. The dicta by the judges in the course of argument in that case were purely obiter. And the case of *Witty* v. *Williams* (1) is not opposed to the plaintiffs' contention, for there the words of the lease were different. The provision in the agreement that the rent should be payable quarterly is inconsistent with the contention that the landlords are entitled to demand payment of rent on any day other than a quarter day. At the commencement of each quarter the defendants had an election whether they would require payment of that quarter in advance or not, but when once they had let the quarter day go by their election for that quarter was gone.

Secondly, the defendants would not have been entitled to distrain immediately upon demand, but only after the expiry of a reasonable notice. For in the case of a penal rent such as this, the tenant, not knowing whether his landlord will insist on it or not, is not bound to be ready with the money before notice:

(1) 12 W. R. 755. (2) 22 L. J. (Ex.) at p. 284.

Mallam v. *Arden.* (1) And that notice must be a reasonable notice; that is to say, the tenant is entitled to a reasonable length of time after demand to enable him to get the money: *Brighty* v. *Norton.* (2) The fact that here the money was actually paid upon demand does not show that there was a reasonable notice, for the money was paid by third parties, and the question is whether there was a reasonable notice to the tenant to enable him to pay.

Leigh Clare, in reply. It is conceded that the landlord cannot distrain for a forehand rent of this kind without first making demand; but whether, after making such demand, it is reasonable that he should hold his hand for a certain period of time, must depend upon the circumstances of each particular case. If the plaintiffs' contention is right, that the defendants in the present case were bound to allow a certain interval to elapse between demand and distress, the whole object of the proviso would have been defeated, for it would have enabled the purchasers to remove the goods from off the premises, and the defendants could not have followed them under the statute of George II.

GRANTHAM, J. I am of opinion that the county court judge was wrong in the view which he took of the law which is applicable to agreements such as this, whereby the quarter's rent is made payable in advance if required. It seems to me that the true effect of such an agreement is that the rent of each quarter is always due in advance whether a demand be made or not, but that the landlord cannot resort to his remedies for non-payment of the rent so due until after he has demanded it. Such demand may be made at any time during the quarter, and the landlord is not bound to make it, as the plaintiffs contended, on or before the first day of the quarter. It was further contended on behalf of the plaintiffs that even if the defendants were entitled to demand the rent in advance during the currency of the quarter, they were not entitled to distrain at once, but were bound to give a reasonable notice, or in other words allow a reasonable time for payment. But the correctness of that contention must depend upon the circumstances of each case. And when we

(1) 10 Bing. 299. (2) 3 B. & S. 305.

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LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY CO.

Grantham, J.

consider the facts of the case before us it becomes obvious that it was not reasonable to require the defendants to allow any interval of time between the demand for payment and the exercise by them of their right of distress. The object of the agreement was to enable the landlords to secure payment of their rent by distraining if the necessity arose. Here the goods were about to be sold to third parties who would have had a right to remove them from the premises, and in whose hands they could not have been followed. Under the circumstances I think that if the rent had not been paid upon demand the defendants would have been entitled to distrain at once.

VAUGHAN WILLIAMS, J. I am of the same opinion. As the question of the true construction to be put upon agreements of this kind is one which is likely often to arise between landlords and tenants, we ought not to leave any doubt as to the basis of our decision. If Mr. Clare's contention had been, not that the rent was reserved due in advance by the agreement itself, but merely that the landlords had a right at any time that they thought fit to alter the date at which the rent would otherwise become due, and by making a demand cause it to become due in advance, I should not have been prepared to decide in his favour. And for this reason. The tenant would not in such case have been bound to have the money lying at his bankers at the commencement of each quarter ready to meet the landlords' demand of payment if it should be made, but would only have been bound to set about procuring the money as soon as the demand was made, and would have been entitled to a reasonable time within which to procure it, or, in other words, the rent could not become due until the expiry of a reasonable time after demand. The consequence would be that until the expiry of that interval the landlords' right of distress would not accrue, whereas the defendants' case here was framed upon the assumption that they would have had a right to distrain immediately upon demand made. But it was contended that under the agreement the rent was due throughout in advance whether any demand was made or not. The question is whether we are entitled to put that construction upon the agreement. I think we are. It seems to me that the inten-

tion of the parties was that the rent should always be due at the commencement of each quarter; but that it should not be treated as in arrear, nor the landlords entitled to enforce their remedies for non-payment until after demand for payment had first been made.

Appeal allowed.

Solicitor for plaintiffs: *J. C. Jackman.*
Solicitor for defendants: *Mason.*

J. F. C.

SMITH *v.* ROBINSON.

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May 30, 31; *June* 2.

Landlord and Tenant—Lease—Covenant by Lessee to pay Charge imposed on Lessor in respect of Premises—Order by Sanitary Authority on Lessor to abate Nuisance—Expenses incurred in complying with Order—Liability of Lessee—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76).

A lessee covenanted to pay, bear, and discharge all land-tax, sewers rate, main drainage rate, and all other rates, taxes, assessment charges, or impositions whatsoever, parliamentary, parochial, or otherwise, taxed, charged, assessed, or imposed upon the demised premises, or on the lessor for or in respect of the premises. The lessee also covenanted to repair. The lessee failed to repair, in consequence of which a drain on the premises got out of order, and caused a nuisance. The sanitary authority made an order on the lessor, under the Public Health (London) Act, 1891, directing him to repair the drain. The lessor incurred expenses in complying with this order, and sued the lessee to recover the amount:—

Held, that the expenses so incurred were a charge imposed on the lessor in respect of the premises, and the plaintiff was entitled to recover.

APPEAL by the defendant from the judgment of the judge of the Westminster County Court in favour of the plaintiff, in an action brought to recover the amount of certain expenses incurred by the plaintiff in complying with an order made on him as owner of a house by the sanitary authority, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76).

The plaintiff demised to the defendant a dwelling-house for the term of seventeen years at the rent of 60*l*. The lease contained a covenant on the part of the defendant that he "shall and will during the continuance of this demise pay, bear, and discharge all land-tax, sewers rate, main drainage rate, and all other rates, taxes, assessment charges, or impositions whatsoever,

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parliamentary, parochial, or otherwise, which now are or at any time during the continuance of this demise may be taxed, charged, assessed, or imposed upon the said demised premises, or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the lessor, his executors, administrators, and assigns, for or in respect of the said premises." Then followed a covenant to repair as follows: "The lessee, his executors, administrators, and assigns, shall and will forthwith put the said premises into complete repair at his and their own expense, and to the satisfaction of the lessor, his executors and administrators, and from time to time, and at all times during the said term hereby granted, at his and their own proper costs and charges, well and sufficiently repair, support, uphold, maintain, pave, cleanse, glaze, amend, and keep the said messuage or tenement and premises hereby demised, with all and singular the appurtenances, and all the walls, pales, posts, rails, pavements, sinks, sewers, drains, gutters, vaults, houses of office, and watercourses thereto belonging, or in any wise appertaining, in, by, and with all needful and necessary reparations, when, where, and as often as need or occasion shall require, damage by fire only excepted."

The defendant failed to keep the premises in repair, and the result was that a drain became defective, so as to cause an escape of sewer gas into the basement, which created a nuisance. The sanitary authority made an order on the plaintiff, as owner of the premises, to abate the nuisance, and put the drain into proper repair; and in complying with this order the plaintiff incurred expenses to the amount of 16*l.* 10*s.*, which he claimed to recover from the defendant, and for which judgment was given in the county court.

May 30, 31. *Lynden Bell*, for the defendant, in support of the appeal. The county court judge decided in favour of the plaintiff on the authority of *Hartley* v. *Hudson* (1); but that case is distinguishable from the present, for it was not a case of a nuisance. The money in that case was expended in paving, and that was properly held to be a charge upon the landlord in

(1) 4 C. P. D. 367.

respect of the premises. Here the plaintiff has himself been guilty of a misfeasance in allowing the nuisance to continue, and is therefore not entitled to recover. *Rawlins* v. *Briggs* (1) is an authority in the defendant's favour. In the other cases in which the occupier has been held liable the words have been more comprehensive than those in the present case, as, for instance, "outgoings" and "duties": *Crosse* v. *Raw* (2); *Budd* v. *Marshall* (3); *Lyon* v. *Greenhow.* (4)

Cluer, for the plaintiff. These expenses were rightly held to be a parliamentary charge on the owner in respect of the premises, and are therefore recoverable under the covenant. Sect. 121 of the Act (54 & 55 Vict. c. 76) expressly saves contracts between owner and occupier. The words are wider than those in *Allum* v. *Dickinson.* (5) The point as to the difference between the case of paving expenses and that of a nuisance has never been taken until now, and the distinction is not a sound one. *Hartley* v. *Hudson* (6), which the county court judge followed, was cited with approval in the Court of Appeal in *Budd* v. *Marshall.* (3)

Lynden Bell, replied.

Cur. adv. vult.

June 2. The judgment of the Court (Mathew and Wright, JJ.) was delivered by

WRIGHT, J., who, after reading the covenants, proceeded as follows. The defendant did not repair in accordance with the terms of his covenant, and the effect of his neglect to repair was to cause a nuisance. Thereupon the usual proceedings were taken by the local authority, and certain works were prescribed which the plaintiff has been obliged to execute. He now brings this action to recover the expenses as charged against him by the local authority. The claim for damages has been waived, and the only question is as to the defendant's liability on the covenant to pay the amount of these expenses. The case is covered by the authorities unless it can be

(1) 3 C. P. D. 368.
(2) Law Rep. 9 Ex. 209.
(3) 5 C. P. D. 481.
(4) 8 Times Reports, 457.
(5) 9 Q. B. D. 632.
(6) 4 C. P. D. 367.

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distinguished on the ground that this is not a case of making a new drain. It appeared at first somewhat doubtful whether simple repairs executed in order to abate a nuisance, which presumably there is a common law duty to abate, and which is covered by the repairing covenant, could come within the principle. We have, however, come to the conclusion that the covenant does apply. The whole matter is statutory, and arises out of the exercise by the local authority of its power to control, in the public interest, the uses and condition of house property. The "nuisance" itself may be merely the creature of the statute, as, for instance, a nuisance only to the health of the occupier himself. The work to be done may be different from that which is necessary in order to abate a common law nuisance *or to satisfy a repairing covenant.* The local authority or the justices prescribe the works which are to be executed. The "owner," who is made liable by statute, may be a different person from the person who would be liable for the nuisance at common law. The expenses are recoverable by the local authority by statutory means. They are made a charge on the owner. For these reasons we have come to the conclusion that the case is within the words of the covenant, and, that being so, the cases as to new drains and paving expenses apply. Tenants have got off in cases where no such word has occurred as "charge," "duty," or "outgoings," or where there have been no words extending to charges upon the owner, or where there are words indicating an intention that the landlord is to pay; but where the words are sufficient we must hold the governing intention to be that the owner shall get his rent clear of all deductions. At the close of the argument the case of *In re Bettingham, Melhado* v. *Woodcock* (1) was handed up to us. In that case North, J., came to the same conclusion as that which we have arrived at in the present case, and on the same statute.

Appeal dismissed.

Solicitors for plaintiff: *Lovell, Son, & Pitfield.*
Solicitors for defendant: *Thomas Dyson & Co.*

(1) 9 Times Reports, 48.

P. B. H.

APLIN, Appellant *v.* PORRITT and Others, Respondents. 1893 *May* 31.

Criminal Law—Cruelty to Animals—"Domestic Animals"—Wild Rabbits confined and coursed in Enclosure—12 & 13 *Vict. c.* 92, *ss.* 2, 29—17 & 18 *Vict. c.* 60, *s.* 3.

The respondents coursed with dogs, in an enclosed field, wild rabbits, which had been caught in nets five or six days previously, and since kept in confinement and fed, and cruelly tortured them.

On a case stated on an information for cruelly torturing the rabbits:—

Held, that the rabbits were not "domestic animals," and therefore the respondents could not be convicted.

Case stated by justices.

The respondents were charged with cruelly ill-treating, abusing, and torturing certain animals.

The animals in question were wild rabbits, which had been caught in nets five or six days before the commission of the alleged offence, and had been kept and fed in the interval. The respondents put the rabbits into boxes, took them into an enclosed field, let them out of the boxes one by one, and coursed them with dogs. None of the rabbits escaped, and some of them, which had been caught and mangled by the dogs, were thrown aside and left still alive.

The justices said they had no doubt that the respondents did cruelly ill-treat, abuse, and torture the rabbits; but they held that the rabbits were not domestic animals, within the meaning of the Cruelty to Animals Acts (1), and that therefore

(1) By the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 3: "If any person shall cruelly beat, ill-treat, over-drive, abuse, or torture, or cause, or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l*."

By s. 29: "The word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal."

By the Cruelty to Animals Act, 1854 (17 & 18 Vict, c. 60), s. 3: "The words and expressions to which a meaning is affixed by 12 & 13 Vict. c. 92, and which are introduced into this Act, shall have the same meaning in this Act, and the word 'animal' shall in the said Act and in this Act mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act, or of any other kind or species whatever, and whether a quadruped or not."

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the respondents could not be convicted, and dismissed the information.

Smyly, Q.C. (*Colam*, with him), for the appellant. The magistrates ought to have convicted. The rabbits, having been kept some days in confinement and fed, had become domestic animals within the meaning of the statutes. They would be the subject of larceny at common law: Hawkins's Pleas of the Crown, bk. i. c. 33, s. 41, vol. i. p. 215. The object of the Cruelty to Animals Acts is to protect those animals which, from having been reduced into subjection and placed in the power of man, have been deprived of the means of protection with which they were provided by nature. [He referred to *Colam* v. *Pagett* (1); *Swan* v. *Sanders*. (2)]

The respondents did not appear.

MATHEW, J. This is a very plain case, and one which does not require judgment to be given at any great length. If rabbits under the circumstances stated were to be held to be domestic animals within the meaning of the statutes, it would be impossible to distinguish this from the case of a bagged fox or rats kept in a cage in order to be killed by dogs. If the law has not protected these animals we can only regret that we cannot do so. The decision of the magistrates is right, and must be upheld.

WRIGHT, J., concurred.

Judgment for the respondents. (3)

Solicitor for appellant: *A. Leslie.*

(1) 12 Q. B. D. 66.

(2) 50 L. J. (M.C.) 67.

(3) See *Pitts* v. *Millar* (Law Rep. 9 Q. B. 380), where a similar state of facts was held not to amount to the offence of baiting animals within the meaning of s. 3 of the same Act.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1893
May 4, 16.

SHAW, PETITIONER; RECKITT, RESPONDENT.

(THE PONTEFRACT ELECTION PETITION.)

Parliament—Election—Practice—Election Petition—Appeal on Interlocutory Matter—Decision of High Court on Question of Law—Amendment of Petition—Leave of High Court—Judge not on Rota for Trial of Election Petitions—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 *Vict. c.* 51), *ss.* 40, 56—*Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 14.

By s. 14 of the Judicature Act, 1881, "the jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under . . . the Parliamentary Elections Act, 1868 . . . or any Act amending the same, shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."

An order for the amendment of an election petition made under s. 40 of the Corrupt and Illegal Practices Prevention Act, 1883, by a judge sitting at chambers, who was not on the rota for the trial of election petitions, having been rescinded by the High Court on the ground that he had no jurisdiction to make such order:—

Held, that the question so decided was one of law within the meaning of s. 14 of the Judicature Act, 1881, and consequently that no appeal lay to the Court of Appeal without leave.

APPEAL from the decision of a Divisional Court (Hawkins and Cave, JJ.). (1)

The facts were as follows. Grantham, J., not being one of the judges on the rota for the trial of election petitions, had made an order at chambers on an ex parte application giving the petitioner leave to amend an election petition under s. 40 of the Corrupt and Illegal Practices Prevention Act, 1883. The respondent applied to set this order aside, and a Divisional Court, consisting of two judges, both of whom were on the rota for the trial of election petitions, held that the learned judge had no jurisdiction to make the order, and consequently set it aside. Leave to appeal was refused.

Pope, Q.C., and *S. H. Day*, for the respondent, took the preliminary objection that no appeal lay. Sect. 14 of the Judicature Act, 1881 (44 & 45 Vict. c. 68), provides that the jurisdiction of

(1) [1893] 1 Q. B. 779.

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the High Court of Justice to decide questions of law upon appeal or otherwise under the Parliamentary Elections Act, 1868, or any Act amending the same, shall be final and conclusive, unless special leave to appeal to the Court of Appeal be given. The Corrupt and Illegal Practices Prevention Act, 1883, amends the Parliamentary Elections Act, 1868. The question decided in the Divisional Court was a question of law, viz., whether Grantham, J., had jurisdiction to make the order; and no leave to appeal was given.

Bigham, Q.C., and *Wm. Graham*, (*Coward*, with them), for the petitioner. The question whether leave to amend should be given is a question of discretion; but, assuming that the question decided in the Divisional Court is a question of law in the general sense of the term, it is contended that it is not such a question of law as is contemplated by s. 14 of the Judicature Act, 1881. The words of that section must be read with reference to the previous legislation. The Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 11, sub-s. 16, provides for the statement of a special case when the case raised by the petition can be conveniently so stated, and s. 12 provides that the judge may reserve a question of law arising at the trial for the consideration of the Court. Sect. 14 contemplates questions of law such as those, on which the result of the petition depends, not questions of law arising on mere interlocutory applications: *Harmon* v. *Park*. (1)

[They also cited *Line* v. *Warren* (2) and *Unwin* v. *McMullen*. (3)]

Pope, Q.C., in reply.

Cur. adv. vult.

May 16. The following judgments were delivered:—

LORD ESHER, M.R. This is an appeal from the decision of a Divisional Court, consisting of two judges on the rota for the trial of parliamentary election petitions, upon the question whether an order made by Grantham, J., at chambers, giving leave to amend a parliamentary election petition, was right or not. He

(1) 6 Q. B. D. 323. (2) 14 Q. B. D. 548.
(3) [1891] 1 Q. B. 694.

made such order, not being a judge on the rota; and the appeal to the Divisional Court was on the ground that he had no jurisdiction to make such an order, not being on the rota, and also on the ground that the order was made ex parte. It seems to me that the judges sitting in the Divisional Court clearly had jurisdiction to determine whether what was done by the judge at chambers was right; and, that being so, they did come to a decision on the matter, and from that decision an appeal is brought to this Court. Thus the question arises whether such an appeal will lie. The objection was taken that no such appeal will lie, because s. 14 of the Judicature Act, 1881, in terms says that there shall be no appeal from the High Court on a question of law in such a case without leave of the High Court. It was hardly disputed that, if the words of that section are to be read in their ordinary sense, they are large enough to include this case. But it was said that, looking at former Acts relating to this subject-matter, they ought to be limited to such questions of law as might be decided under those former Acts. I cannot see any sufficient ground for so limiting the meaning of the words, or for construing them otherwise than according to their ordinary meaning. For these reasons I think the appeal must be dismissed.

LOPES, L.J. This is an appeal from the order of the Divisional Court, rescinding an order made by Grantham, J., at chambers, which gave leave to amend the petition presented against the successful candidate at the last election for the borough of Pontefract.

Since the filing of the petition the respondent and his agent had made a return of election expenses, and the petitioner applied ex parte to Grantham, J. (who was not on the rota of the judges for the trial of election petitions), at chambers, for leave to amend the petition under s. 40, sub-s. 2, of the Corrupt and Illegal Practices Prevention Act, 1883, by adding charges founded upon that return, and Grantham, J., gave leave. The Divisional Court (consisting of Hawkins and Cave, JJ., both judges on the rota for the trial of election petitions) rescinded this order, upon the ground that a judge not on the rota had no

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jurisdiction to make the order, and also upon the ground that the order ought not to have been made ex parte.

The petitioner appealed to this Court, and a preliminary objection was taken that no appeal lay, upon the ground that s. 14 of the Judicature Act, 1881, prevented an appeal. That section provides that the jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under the Parliamentary Elections Act, 1868, or any Act amending the same, shall be final and conclusive, unless the High Court give leave to appeal to the Court of Appeal. Leave to appeal in this case was refused.

Was the point decided by the High Court a question of law? The High Court decided that Grantham, J., not being a judge on the rota for the trial of election petitions, had no jurisdiction to give leave to amend the petition.

This depended on the construction of certain Acts of Parliament, and was in my opinion a question of law.

But it was urged that it was not a question of law within the meaning of s. 14 of the Judicature Act, 1881. It was said that the "questions of law" referred to in that section were questions of law dealt with in the Parliamentary Elections Act, 1868, such as a special case stated before the trial, and a question of law reserved at the trial; and that this interlocutory question of law as to the power to amend a petition was not a question of law contemplated by s. 14 of the Judicature Act, 1881.

But the words of s. 14 are (after enumerating certain Acts, including the Parliamentary Elections Act, 1868), "or any of the said Acts, or any Act amending the same respectively." The Corrupt Practices Act, 1883, was an Act amending the Act of 1868, and the power of a judge to give leave to amend under s. 40 of the Act of 1883 is a question of law. The preliminary objection therefore succeeds, and the appeal must be dismissed.

A. L. SMITH, L.J. In this case Grantham, J., sitting at chambers, he not at the time being on the rota of election judges, made an order amending an election petition filed against the sitting member for the borough of Pontefract, and in so doing acted under s. 40 of the Corrupt and Illegal

Practices Prevention Act, 1883. This order was taken by way of appeal to the Divisional Court, consisting of two judges upon the rota, where it was argued that Grantham, J., had no jurisdiction to make the order. The Divisional Court held this to be so, and against this judgment the present appeal is brought.

That this was a question of law I cannot doubt. It was attempted to be argued before us that amending a petition was merely a matter of discretion and not of law; but the point argued in the Divisional Court was not whether the judge had properly exercised his discretion, but whether he had any jurisdiction to exercise any discretion at all, or, in other words, whether under the statutes he was the right judge to make the order, and the Court held that he was not.

This being so, the point now to be determined is whether this is a question of law within the meaning of s. 14 of the Judicature Act, 1881; for, if it is, there is no appeal to this Court except by leave. Sect. 14 reads as follows: "The jurisdiction of the High Court of Justice to decide questions of law upon appeal or otherwise, under . . . . the Parliamentary Elections Act, 1868 . . . . or any Act amending the same . . . . shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive." It was argued by Mr. Bigham for the petitioner that the questions of law mentioned in s. 14 of the Judicature Act, 1881, were limited to those which were specifically mentioned in the Parliamentary Elections Act, 1868, such as those mentioned in s. 11, sub-s. 16, and in s. 12; but it must be remarked that s. 14 of the Judicature Act, 1881, embraces questions of law arising not only under the Parliamentary Elections Act, 1868, but under any Act amending the same. No one can say that the Act of 1883 does not amend the Act of 1868; for instance, I may take s. 43 of the Act of 1868, whereby a candidate found, by the report of a judge upon an election petition, guilty of bribery, shall be incapable of sitting in the House of Commons during the seven years next after the date of his so being found guilty; whereas, by s. 4 of the Act of 1883, he is incapacitated for ever from being elected for the county or

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A. L. Smith, L.J.

borough in which he has been found guilty. It will be seen that it is upon a question of law arising under the Act of 1883, which amends the Act of 1868, that the present point now arises, and consequently in my judgment there is no appeal except upon special leave.

The case of *Harmon* v. *Park* (1) was decided upon an Act which enacted that the decision of the Court of Common Pleas should be final where it gave its decision upon a special case, and it was therein held that there was an appeal upon a decision upon an interlocutory matter not raised by special case, but this decision was before the Act of 1881, which makes the decision of the Divisional Court final upon questions of law, no matter how raised, unless special leave be given to appeal. The cases of *Line* v. *Warren* (2), and *Unwin* v. *McMullen* (3), cited in argument, do not apply to the present point.

For these reasons in my judgment the question decided by the Divisional Court was a question of law within s. 14 of the Judicature Act, 1881, and consequently there is no appeal to this Court, no special leave in that behalf having been granted.

Appeal dismissed.

Solicitor for petitioner: *W. Chatterton.*
Solicitors for respondent: *Day, Russell & Co.*

(1) 6 Q. B. D. 323. (2) 14 Q. B. D. 548.
(3) [1891] 1 Q. B. 694.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1892
Feb. 26.

TAYLOR *v.* SMITH. (1)

Sale of Goods—Memorandum in Writing—Several Documents—Acceptance—Statute of Frauds (29 *Car. II., c.* 3), *s.* 17.

The defendant, who carried on business at Manchester, orally agreed to purchase from the plaintiffs, timber merchants at Liverpool, a quantity of spruce deals, to be forwarded to Manchester by a carrier nominated by the defendant. An invoice of the goods was sent by the plaintiffs to the defendant, and the carrier also sent an advice note to inform him of the arrival of the goods at Manchester. This note specified the number of the deals, and stated them to be consigned by the plaintiffs, but did not state their price, nor refer to the invoice or any other document. On October 28, the day of the arrival of the goods, and on the following day, the defendant inspected them, and subsequently wrote and signed the following memorandum on the advice note: "Rejected. Not according to representation." On November 8, he wrote to the plaintiffs, rejecting the goods as not being according to contract:—

Held, first, that there was not a sufficient note of the bargain within the 17th section of the Statute of Frauds; secondly, that the proper conclusion from the facts was that there had been no such dealing with the goods by the defendant as to constitute an acceptance of them by him within the same section.

Morton v. *Tibbett* (15 Q. B. 428), *Kibble* v. *Gough* (38 L. T. (N.S.) 204), and *Page* v. *Morgan* (15 Q. B. D. 228) considered.

Appeal of plaintiffs from judgment of Wright, J., dismissing the action, which was to recover the price of timber sold and delivered to the defendant.

At the trial before Wright, J., without a jury, at the Liverpool Summer Assizes, 1891, it appeared that in October, 1890, the defendant, who carried on business at Manchester, orally agreed with the plaintiffs, who were timber merchants at Liverpool, to purchase from them 1060 spruce deals, which were to be of fair average quality, and were to be delivered in Liverpool to Kenworthy, a carrier chosen by the defendant, and to be carried to Manchester in Kenworthy's barge. The deals were delivered to Kenworthy, who conveyed them to Manchester, and on

(1) This case was accidentally omitted from the Law Reports of 1892, and is now reported in deference to representations from various quarters. Mistakes of this kind must occasionally happen, and the Council will welcome any similar representation or suggestion in the future.

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October 23 sent an advice note to the defendant: "The undermentioned goods consigned to you having arrived at this station, we will thank you for instructions as to their removal, as they remain here to your order, and are now held by us not as common carriers, but as warehousemen at owner's sole risk of loss or damage or deterioration by fire." The schedule at the foot of the note mentioned the number of the deals, 1060, and named the plaintiffs as consignors, but did not mention the price, nor refer to any other document. The deals were landed on the 28th, on which day, and again on the 29th, the defendant inspected them at the wharf. There was contradictory evidence as to whether the defendant did not again inspect them on November 5; but this was not established. It did not appear that he moved them or did anything more than look at them. He admitted that he frequently kept timber at the wharf.

On October 29 or November 5 the defendant wrote across the advice note: "Refused. Not according to representation. John Smith." On November 5, Kenworthy communicated this refusal to the plaintiffs. In the meantime the plaintiffs had sent to the defendant an invoice as follows:—"Mr. John Smith, Manchester. Bought from Messrs. Charles Taylor, Sons & Co., 1060 spruce deals. Free to flat, 100*l.* 11*s.* 4*d.*, per Kenworthy's flat, Arthur."

This invoice was dated October 21, but was sent to the defendant in a letter of October 30. To this letter the defendant returned no answer. On November 8 the defendant wrote to the plaintiffs as follows:—

"With reference to the deals refused by me now lying at Kenworthy's, they are not according to representation, and much inferior in quality to any St. Johns spruce deals I have seen. I consider them fully 10*s.* per standard below average value, and therefore cannot accept same."

The defences at the trial were, first, that the quality of the goods was not according to the bargain, and, second, that the Statute of Frauds had not been complied with.

The learned judge held that there had been no acceptance of the goods sufficient to satisfy the 17th section of the statute.

Bigham, Q.C., and *A. Rutherford*, for the plaintiffs. First, there was a sufficient memorandum in writing within the statute. The invoice and the advice note on the face of them relate to the same subject-matter, for in each 1060 deals are mentioned, and it is absurd to suppose that another 1060 deals were to come from the same quarter. If two documents on the face of them without parol evidence relate to the same subject-matter, and the terms of a contract can be made out from them, then if one of them is signed by the party to be charged, the statute is satisfied. If the defendant had written his refusal on the invoice instead of on the advice note, there clearly would have been a sufficient memorandum. What the defendant did comes substantially to the same thing. The letter of November 8, when read with the other documents, confirms this view. The defendant there admits the existence of a contract to buy the goods.

But assuming that there was not a sufficient memorandum in writing, there was an acceptance of the goods within the meaning of the statute: *Page* v. *Morgan*. (1)

[LORD HERSCHELL. That case only decides that there was evidence on which the jury might find acceptance; it does not say that they were right in so finding.]

It is submitted that the judgments go beyond that, and approve the finding of the jury. The Master of the Rolls distinctly states that examination of the goods admitted a contract and amounted to acceptance.

[KAY, L.J., referred to *Smith* v. *Hudson*. (2)]

What must be considered is whether the purchaser has done something which can only be accounted for on the supposition that there is a contract.

[LORD HERSCHELL referred to *Bushel* v. *Wheeler* (3) and *Norman* v. *Phillips*. (4)]

The doctrine laid down in *Hanson* v. *Armitage* (5) and *Norman* v. *Phillips* (4), that there was no acceptance while a right to reject the goods on the ground of defective quality remained, has been put an end to by *Morton* v. *Tibbett* (6), a case which is

(1) 15 Q. B. D. 228.
(2) 6 B. & S. 431.
(3) 15 Q. B. 442.
(4) 14 M. & W. 277.
(5) 5 B. & A. 557.
(6) 15 Q. B. 428.

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strongly in favour of the plaintiffs. Acceptance is to be inferred from delivery of the goods at what was in effect the defendant's own wharf, and from the delay in communicating any refusal to the plaintiffs.

T. W. Chitty, for the defendant.

[LORD HERSCHELL. You need not address yourself to the question whether there was a memorandum in writing.]

There was no acceptance of the goods by the defendant, for delivery to a carrier appointed by the purchaser is not acceptance: *Smith* v. *Hudson*. (1) A mere inspection does not constitute an acceptance: *Hunt* v. *Hecht*. (2)

[KAY, L.J. Is that case reconcilable with *Page* v. *Morgan*? (3)]

Yes; the latter case only decided that there was evidence on which a jury might come to the conclusion that the defendant had accepted the goods, and here the evidence is weaker. *Morton* v. *Tibbett* (4) was doubted in *Coombs* v. *Bristol and Exeter Ry. Co.* (5); but it must now be treated as good law. It first removed the impression that an acceptance under the statute must be one which precludes the purchaser from objecting to the goods as not according to sample. But in *Morton* v. *Tibbett* (4) there was much more than in the present case: the defendant had actually resold the goods, and it was impossible to say that he had not recognized the contract by his acts, which were only to be accounted for by the existence of a contract. [He also referred to *Rickard* v. *Moore*. (6)]

Bigham, Q.C., in reply. Acceptance within the statute cannot be taken to mean acceptance of the goods as conforming to the contract so as to preclude the acceptor from rejecting them as not corresponding to it, but must mean some act which can only be explained by the existence of a contract. If a purchaser on being told that goods have arrived for him, instead of saying that he has nothing to do with them, examines them and then states that he rejects them as not being according to representation, his acts are only consistent with his having contracted to buy such goods: *Page* v. *Morgan* (3); *Kibble* v. *Gough*. (7)

(1) 6 B. & S. 431.
(2) 8 Ex. 814.
(3) 15 Q. B. D. 228.
(4) 15 Q. B. 428.
(5) 3 H. & N. 510.
(6) 38 L. T. (N.S.) 841.
(7) 38 L. T. (N.S.) 204.

LORD HERSCHELL. This action is brought in respect of an alleged contract for the sale of deals, and the question is whether there is a contract complying with the requisitions of the 17th section of the Statute of Frauds. The bargain was made by word of mouth. An invoice was made out which was dated October 21, but not sent to the defendant till October 30, which was in these terms: — "Mr. John Smith, Manchester. Bought from Messrs. Charles Taylor, Sons & Co., 1060 spruce deals. Free to flat, 100*l.* 11*s.* 4*d.*, per Kenworthy's flat, Arthur." Kenworthy was a carrier who carried goods to Manchester, and part of the arrangement was that the deals should be sent by Kenworthy's flat. The first question is whether there was a memorandum in writing signed by the defendant of the terms of the contract. No letter was written by him which contained any direct reference to the invoice. He signed the following memorandum on the advice note sent him by the carrier:— "Refused. Not according to representation. John Smith." The only other document signed by the defendant was a letter dated November 8, written by him to the plaintiffs, which was as follows:—"With reference to the deals refused by me now lying at Kenworthy's, they are not according to representation, and much inferior in quality to any St. Johns spruce deals I have seen. I consider them fully 10*s.* per standard below average value, and therefore cannot accept same." The question is whether either or both of these documents can be said to be, in conjunction with any document incorporated with or referred to in them, or either of them, a memorandum within the statute. It is obvious that the advice note, the indorsed memorandum, and the letter do not by themselves constitute such a memorandum, for the terms of the bargain are not to be found in them. If any of them had referred to or incorporated the invoice I think there would have been a sufficient memorandum; but it is impossible to say that the invoice is incorporated with or referred to in any of them. There is therefore no memorandum to satisfy the statute.

The second point is this—it was strongly insisted upon by the plaintiffs—that there was an acceptance of the goods and an actual receipt of them by the purchaser. About the receipt there is no

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difficulty. The goods were sent to the defendant on the flat of Kenworthy, the carrier chosen by him, were landed at Kenworthy's wharf, and notice of their arrival was sent to the defendant by Kenworthy informing him that they were then at his order. But the statute requires that the goods, or some part thereof, shall have been accepted as well as received. Acceptance therefore means something beyond receipt; receipt alone is not enough. That receipt by a carrier designated by the purchaser is not enough to constitute an acceptance has been settled by numerous authorities which have not been overruled, though some of the dicta in them may be inconsistent with later decisions. What have we here beyond the receipt? The defendant examined the goods on October 28 and 29. There is a controversy as to whether he did not examine them again on November 5. He denies that he did, and it would not be safe to act on the view that he did make this later examination. On the 29th of October, as he says, he wrote the memorandum of refusal on the advice note, and there is no evidence on which we could safely act that he wrote it at any later date. Then on November 8 he writes the letter I have read. Can he under these circumstances be said to have accepted as well as received the goods? It has been decided that there may be an acceptance of goods within the meaning of the statute, though the right to reject the goods as not being according to sample has not been lost; but unfortunately the cases give no clear explanation of what is an acceptance within the meaning of the statute. The statute has not said that there must be some act recognizing the contract; it requires recognition in a particular way, by acceptance of the goods or some portion of them. "Acceptance" is not used in the statute according to its common acceptation, and in what precise sense it is used has never been determined. The plaintiffs in support of the view that there has been an acceptance rely on *Morton* v. *Tibbett* (1), and the two recent cases in the Court of Appeal of *Kibble* v. *Gough* (2) and *Page* v. *Morgan*. (3) In the two latter cases the action was tried by a jury, and the question before the Court of Appeal was not whether

(1) 15 Q. B. 428.

(2) 38 L. T. (N.S.) 204.

(3) 15 Q. B. D. 228.

there had been an acceptance, but whether there was evidence of acceptance to go to the jury, and the Court held that there was. *Page* v. *Morgan* (1) was most relied on, where the law was laid down by Bowen, L.J., in these terms: "Having regard to the mischiefs at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract." In that case the goods, which consisted of bags of flour, had been taken in part into the defendant's mill, and he there opened some of them for examination. It was held that there was evidence to go to the jury that he had accepted the goods. In the present case the question is not whether there was evidence on which a jury might find acceptance, but whether the judge was wrong in finding that there had not been an acceptance. I am not satisfied that there was an acceptance of these goods within any reasonable meaning of the word. I cannot think that the mere inspection of the goods by the defendant amounted to acceptance, even accompanied with such delay as there was in communicating with the vendors. No doubt you might have a case in which there was such an amount of delay after the goods had been placed in the custody directed by the purchaser as to prevent the purchaser from withdrawing, but here there has been no such lapse of time as can preclude the purchaser from denying that he has accepted the goods. The question then is, has there been any such dealing with the goods as amounts to acceptance. I think that no case has gone quite so far as we should be going if we were to say that there was here evidence on which a jury might properly find acceptance. In *Page* v. *Morgan* (1) the purchaser had some of the sacks taken into his mill; here the goods were only landed at Kenworthy's wharf, and the defendant gave no directions as to dealing with them. In *Page* v. *Morgan* (1), after some of the sacks had been taken into the defendant's mill, the defendant there opened them. In the present case all that appears is that the goods were at the carrier's wharf and the defendant there looked at them. I think that this mere looking at them cannot be held to amount to acceptance. If I could find that there was acceptance I should not be indisposed

(1) 15 Q. B. D. 228.

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to do so, for one does not like the rights of parties to be defeated on technical grounds; but I think that great mischief would be done by reading a statute in a way in which no reasonable man would read it unless he was determined to get rid of its effect, and by introducing fine distinctions, which cause further litigation by giving rise to other fine distinctions. The appeal must be dismissed.

LINDLEY, L.J. The plaintiff in this case would have been entitled to judgment were it not for the 17th section of the Statute of Frauds; and, familiar as that section is, I will read it: "No contract for the sale of any goods, wares, or merchandizes, for the price of 10*l.* sterling or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

We must first see whether any such memorandum as the section requires was signed by the defendant. He only signed two documents, the first being the writing across the advice note, "Refused. Not according to representation. J. Smith." If you look at the advice note, it is found not to contain anything connecting it with the invoice or with any other document; and the same remark applies to the letter of November 8, which was the only other document the defendant signed. You cannot from the advice note, the indorsement, and the letter, make out the terms of the contract, nor do they refer to any document which contains them. I agree, therefore, that there was no sufficient memorandum in writing.

As regards acceptance—apart from *Morton* v. *Tibbett* (1), as to which I only say that I recognize its authority—I should have thought it plain that there was no acceptance at all. If a man merely looks at goods, and then says he rejects them, how can it be said that he has accepted them? *Morton* v. *Tibbett* (1) was a peculiar case, for the purchaser resold the goods before he saw

(1) 15 Q. B. 428.

them; that was a distinct dealing with the goods, and was held to be such an acceptance as to satisfy the statute, though not such an acceptance as to preclude him from rejecting them if, when he examined them, he found that they were not according to sample. Hence was developed the doctrine that there may be an acceptance within the statute, and yet not such an acceptance as to prevent the purchaser from repudiating the goods on the ground that they are not according to the contract. It appears from *Page* v. *Morgan* (1) that the test is whether there has been such a dealing with the goods as amounts to a recognition of the contract. The jury there found that there had been acceptance, and the Court of Appeal refused to disturb the verdict. The Master of the Rolls said: "I rely, for the purposes of my judgment in the present case, on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract." Whether I should have gone so far I need not say; but we know how difficult it is to upset the verdict of a jury when there is any evidence to support it. In the present case, if I had been the jury, I should have found that the defendant had not accepted the goods. He merely went and looked at them on two occasions, and, finding that they were not what he wanted, he rejected them. I think that there was no acceptance in any sense of the word.

KAY, L.J. The first question is whether there is a sufficient memorandum in writing to take the case out of the statute. The Courts have gone very far in construing referential words so as to connect several documents, and collect the terms of a contract out of them. Here we have an invoice which contains the terms of the contract, but it is not signed by the defendant. There is a carrier's advice note on which is indorsed a memorandum signed by the defendant, but neither the advice note nor the indorsement mentions the price, nor refers to the invoice or to any other document. The number

(1) 15 Q. B. D. 228.

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of deals mentioned in the advice note corresponds with the number in the invoice, but there are no referential words, nothing on the face of the note to connect it with the invoice. Then there is a letter of November 8, signed by the defendant, which may be connected with the advice note, since he wrote on the advice note, "Refused. Not according to representation;" and in the letter he says, "With reference to the deals refused by me, now lying at Kenworthy's." I am not sure that this is not a reference sufficient to connect the two documents, but assuming that to be so, neither the letter nor the advice note refers to the invoice, nor to any other document from which the terms of the contract can be collected. One of the strongest cases as to connecting documents is *Long* v. *Millar*. (1) There the plaintiff agreed to purchase three lots of land at Hammersmith, and signed a document which was a sufficient memorandum of agreement in every respect except that it did not refer to the vendor. The purchaser paid a deposit, and the vendor signed a receipt containing the name of the plaintiff and the amount of the deposit, which was referred to as a deposit "on the purchase of three plots of land at Hammersmith." The Court of Appeal held that the words referring to the purchase were sufficient to incorporate the memorandum signed by the plaintiff, and that the two formed a written contract which satisfied the statute. The present case wants the main element of *Long* v. *Millar* (1), the existence in a document signed by the defendant of words referring to a contract of purchase. I therefore think that there was no memorandum which satisfies the statute.

The principal argument, however, for the plaintiffs was that if there was no sufficient written memorandum there was a receipt and acceptance of the goods such as to satisfy the statute and let in evidence of the parol contract. Receipt I think there was. The deals were sent to a carrier appointed by the purchaser, carried on that carrier's flat, and landed at his wharf, and the carrier sent an advice note to the purchaser. The wharf was one where the defendant frequently kept timber. I think, therefore, that receipt is established. When the purchaser had received the advice note he went on two occasions to the

(1) 4 C. P. D. 450.

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wharf, looked at the deals, but, so far as appears, without moving them, and wrote across the advice note, "Refused. Not according to representation." The only other material circumstance is that the deals remained at the wharf several days before the defendant wrote to the plaintiffs to say that he would not accept them. What the defendant did, immediately after examining the goods, having been to refuse them, how can it be said that he accepted them? If there was any acceptance at all, the defendant must be taken as saying, "I accept these goods for the purpose of admitting that I contracted to purchase them, but I rescind the contract and reject the goods on the ground that they are not according to representation." It may be that there was evidence of an acceptance of that kind to go to a jury, but we are in the place of the jury, and what we have to decide is whether there is sufficient evidence of acceptance to satisfy us, and in my opinion there is not.

Appeal dismissed.

Solicitors for plaintiffs: *Norris, Allens, & Chapman, for J. M. Quiggin & Brothers, Liverpool.*

Solicitors for defendant: *Pritchard, Englefield, & Co., for W. F. Farrington, Manchester.*

H. C. J.

THE QUEEN *v.* REYNOLDS AND ANOTHER, JUSTICES OF FRODSHAM.

1893 *May* 8.

Local Government—Rates—Lighting Rate—Application for Distress Warrant—What Proof Necessary—Lighting and Watching Act, 1833 (3 & 4 *Wm.* 4, *c.* 90), *ss.* 5–15.

Upon the hearing of a summons for non-payment of a rate made under the Lighting and Watching Act, 1833, it is not necessary for the overseers to prove that the formalities prescribed by that Act for its due adoption by the parish have been complied with.

RULE in the nature of a mandamus to justices to issue a distress warrant.

On July 21, 1892, an order was issued under s. 32 of the Lighting and Watching Act, 1833, by the inspectors of the lighting district of the township of Frodsham, in the county of Chester, and duly served on the overseers of the township, requiring them to raise the sum of 85*l.* for the expenses of

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carrying out the provisions of the Act in the said district. The overseers accordingly made a rate upon the ratepayers of that portion of the township which is within the lighting district, and such rate was allowed by justices and published. One James Edwards was assessed at 13*s.* 2*d.* in respect of the said rate, but refused to pay the same. He did not appeal against the rate. The overseers having applied to the justices for a distress warrant, the justices at the hearing, acting upon the authority of a passage in Oke's Magisterial Synopsis, 13th ed., p. 1451, called upon the overseers to prove that all the formalities required by the Lighting and Watching Act, 1833, for the making of a valid rate, had been complied with.

By s. 5 of that Act, upon the application in writing of three or more ratepayers of the parish, the churchwardens are required to appoint a public meeting of the ratepayers to determine whether the provisions of the Act shall be adopted in the parish. And by s. 15 a notice of the adoption of the Act is to be affixed to the church door or other usual place of affixing notices relating to the parochial affairs of the parish.

The overseers proved that in the year 1871 the Act was adopted by the ratepayers at a meeting convened for that purpose, but they failed to give any evidence that the application in writing of three ratepayers required by s. 5 had been given to the churchwardens. And they also failed to give any evidence that a notice of the adoption of the Act had been duly published in the manner provided by s. 15.

In consequence of the failure to give such evidence the justices refused to issue their distress warrant. The overseers having obtained a rule to shew cause why the justices should not issue their distress warrant,

Shepherd Little, for the defendant Edwards, shewed cause. It was a condition precedent to the validity of the rate, not merely that the Act should have been adopted, but that also all the formalities incident to the adoption should have been complied with. The passage in Oke's Magisterial Synopsis, upon which the justices proceeded, correctly states the law.

E. H. Lloyd, for the overseers, was not called upon.

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GRANTHAM, J. In our judgment the justices were misled. It was not necessary for the overseers to prove more than that an order had been issued to them under s. 32 by the inspectors, that they made a demand of payment upon the ratepayer, and that he refused to pay. Until the contrary be shewn, there is a presumption that the Act was properly adopted. In the case of the recovery of school board rates it has always been considered sufficient to prove delivery by the school board of their precept to the overseers, demand by the overseers, and non-payment; it was never thought necessary to shew that the school board who issued the precept were duly elected.

VAUGHAN WILLIAMS, J. I am of the same opinion. If the Act was not in fact properly adopted, it was open to the ratepayer from whom payment of the rate was demanded to prove it, but the onus lay upon him.

Rule absolute.

Solicitors for overseers: *Cunliffes & Davenport, for Churton, Chester.*

Solicitors for Edwards: *Wynne, Holme, & Wynne.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1893 *May* 30.

IN RE AN ARBITRATION BETWEEN BATER AND THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BIRKENHEAD.

Local Government—Offences—Unwholesome Meat—Refusal of Justice to Condemn—Costs incurred by Owner of Meat in resisting Condemnation—"Full Compensation"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 116, 117, 308.

Although the owner of the meat which has been seized by an inspector and brought before a justice for condemnation under ss. 116 and 117 of the Public Health Act, 1875, is not entitled as of right to attend and give evidence in defence of the meat, the justice may, if he thinks fit, hear evidence tendered by such owner in that behalf, and if, after so doing, the justice should refuse to condemn the meat, the full compensation which the owner may be awarded under s. 308 will include the costs which he has reasonably incurred in resisting the condemnation of the meat.

Judgment of the Queen's Bench Division affirmed.

APPEAL from a judgment of the Queen's Bench Division (reported [1893] 1 Q. B. 679) on a special case stated by arbi-

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IN RE BATER AND MAYOR, &C., OF BOROUGH OF BIRKENHEAD.

trators under s. 7 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

It appeared that Thomas Bater was a meat salesman and cattle importer carrying on business at Birkenhead. On August 23, 1892, an inspector of nuisances for the corporation of Birkenhead, who were the local authority for the borough of Birkenhead, under the Public Health Act, 1875, seized, under s. 116 of that Act as unfit for human food, the carcase of a bullock belonging to Bater, and on August 24 the carcase was taken before one of the justices of the peace for the borough. Bater attended before the justice and brought evidence to shew that the meat was not unfit for human food. The justice, having heard this evidence, refused to condemn the meat or to make any order in respect of it.

Proceedings were subsequently taken for the assessment by arbitration of the compensation due under s. 308 for the damage sustained by the seizure of the meat, and a case was stated for the opinion of the Court on two questions, one of which was whether the costs of appearing before the justice and opposing the application for the condemnation of the meat could be recovered as compensation under s. 308. (1)

The Divisional Court decided that such costs were recoverable (2), and against this decision the local authority appealed.

1893. May 30. *Joseph Walton, Q.C.* (*W. F. Taylor,* with him) in support of the appeal. The object of the Act is to protect the public by a summary process of seizing and condemning meat unfit for human food. Consequently no provision is made for the appearance of the owner of the meat as that might cause delay, and if he attends before the magistrate he does so voluntarily, and the costs he has to pay his witnesses are not "damage" sustained by him within the meaning of the Act.

(1) By s. 308 of the Public Health Act, 1875: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act."

(2) [1893] 1 Q. B. 679.

Although the magistrate may not, on that application, have had power to deal with costs, that fact does not give another tribunal power over the costs of the magisterial inquiry, and to decide whether the person claiming compensation was entitled to them or not. [He cited *White* v. *Redfern* (1), and *Waye* v. *Thompson*. (2)]

Poland, Q.C., and *Macmorran*, for Bater, were not called on.

LORD ESHER, M.R. We are bound to read s. 308 in its ordinary and grammatical sense. The words used are very wide, and it seems to me that they must include any pecuniary loss which a man suffers when he is not himself in default. In ordinary language there certainly is damage sustained by a man when, in order to defend his property, he has to call witnesses to prove that he was not in the wrong. It is damage to his pocket because he has to pay the expenses of the witnesses whom he has called. An endeavour is made to avoid this conclusion by giving these expenses a legal name and calling them costs; but they are not the less expenses which the man has had to pay, and for the payment of which he is in the words of the Act entitled to "full compensation." I think the Divisional Court were right, and the appeal must be dismissed.

BOWEN, L.J. I entirely agree.

KAY, L.J. I also agree.

Appeal dismissed.

Solicitors for Bater: *Hamlin, Grammer, & Hamlin, for R. B. Moore & Son, Birkenhead.*

Solicitor for the local authority: *Alfred Gill.*

(1) 5 Q. B. D. 15. (2) 15 Q. B. D. 342.

A. M.

C. A.
1893
May 9.

[IN THE COURT OF APPEAL.]

THOMPSON *v.* PALMER AND ANOTHER.

Practice—Service out of the Jurisdiction—Contract "which, according to the Terms thereof, ought to be performed within the Jurisdiction"—Order XI., *r.* 1 (*e*).

The plaintiff, a civil engineer carrying on business at Newcastle, was employed by the defendants, who had undertaken to construct docks in Spain, to design and superintend the construction of the same. By the terms of the contract between the plaintiff and the defendants, the plaintiff was to prepare drawings and specifications, to take out quantities, and to superintend the construction of the docks, in consideration of a commission of 5*l.* per cent. on the total cost of the works. He was not to be required to be constantly in attendance, but was to visit the works during their construction once in every three months, and to have a competent assistant constantly in attendance to superintend the construction. He was to be paid travelling expenses in connection with his visits (say 40*l.* British sterling per visit), and the agreed commission was to be payable in cash as follows, viz., 1*l.* 10*s.* per cent. upon the contract price of each contract, as and when it was made, and the remaining 3*l.* 10*s.* per cent. at the expiration of every three months on the value of the work done during such three months, subject to the retention of a certain amount, as security for the performance of the plaintiff's duties, which amount was to be paid to the plaintiff within seventy-five days after the works had been finally completed to the defendants' satisfaction. The contract did not in express terms provide where these payments were to be made. The plaintiff sued for a balance payable to him under the contract:—

Held, that the true construction of the contract, having regard to the position of the parties and the circumstances under which it was entered into, was that the payments to the plaintiff were to be made at Newcastle; and therefore leave might be given to issue a concurrent writ in the action, and serve notice thereof upon one of the defendants, a foreigner resident out of the jurisdiction, under Order XI, r. 1 (*e*).

APPEAL from the decision of a Divisional Court (Wills and Charles, JJ.), refusing to set aside an order made at chambers, by which leave was given to the plaintiff to issue a concurrent writ in the action against a foreigner resident in Spain, and to serve notice of such writ upon him there.

The action was brought by the plaintiff, a civil engineer residing and carrying on business at Newcastle, against the defendants, Sir C. M. Palmer, who also resided at Newcastle, and Don José Martinez de las Rivas, a Spanish subject resident

at Bilbao, for 1323*l.* 11*s.* 11*d.*, the balance of an account alleged to be due in respect of commission and travelling expenses under the after-mentioned contract. The defendants, who carried on business at Bilbao in Spain under the firm of Martinez Rivas Palmer, had undertaken to construct certain docks for the Spanish Government at Desierto in Spain. It appeared that the defendant Palmer had in the first instance orally retained the plaintiff in Newcastle to design and superintend the construction of the docks in question, and to advise as to the works. It was afterwards arranged that the terms of the plaintiff's engagement should be reduced to writing, and the plaintiff thereupon embodied them in a letter written by him from Newcastle addressed to the firm at Bilbao in Spain, which the firm answered from Bilbao accepting the same. By the terms so agreed on, the plaintiff was to prepare drawings and specifications, to take out the quantities, and to superintend the construction of the docks and other works, in consideration of a commission of 5*l.* per cent. on the total cost. He was to have the entire superintendence and authority on behalf of the defendants over the construction, and, though not to be required to be constantly in attendance, he engaged to visit the works during their construction once in every three months, or thereabouts, and to have at his own expense a competent and experienced assistant constantly in attendance to superintend the construction. He was to be paid "travelling and other expenses in connection with his visits (say 40*l.* British sterling per visit)" in addition to his commission. All plans, tenders, or proposed expenditure in connection with the construction were to be submitted to the defendants and approved in writing before the work was commenced or expenditure incurred, and no extras were to be allowed without the like written approval. The commission of 5*l.* per cent. was to be payable in cash as follows: 1*l.* 10*s.* 0*d.* per cent. upon the contract price of each contract, as and when it was made, and the remaining 3*l.* 10*s.* 0*d.* per cent. at the expiration of every three calendar months upon the value of the work executed during such three months, such value to be ascertained by the plaintiff's certificate in writing. It was provided, however, that such proportion of every

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instalment of the said 3½ per cent. commission should be withheld by the defendants as would, upon the completion of the works, result in there remaining in their hands the sum of 500*l.* for commission so withheld, in order to insure the proper carrying out by the plaintiff of the agreement and of the duties which he thereby undertook; and that, within seventy-five days after the works had been finally completed to the defendants' satisfaction, the said sum of 500*l.* should be payable to the plaintiff, or, if he should die before the happening of such event, then such part thereof as should at the time of his death remain in their hands should be paid to his representatives.

An order having been made at chambers ex parte for the issue of a concurrent writ against De las Rivas and service as above mentioned, under Order XI., r. 1 (*e*), an application was made on his behalf to the Divisional Court to set aside such order and the service made under it.

The Divisional Court refused the application.

Lawson Walton, Q.C., and *J. Scott Fox*, for the defendant De las Rivas. The question is whether this case comes within Order XI., r. 1 (*e*) which provides for service out of the jurisdiction, when "the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." It is submitted that, on the true construction of this contract, the intention appears to be that payment should be made in Spain. The plaintiff is employed to perform services in connection with works in Spain, and the reasonable inference is that, like other persons employed on the works, he is to be paid where they are being carried on. Where the contract is to render services, the natural implication is that the payment is to be where the services are rendered: *The Eider* (1); *Rein* v. *Stein*. (2) If that is not so, then, the contract naming no place for the payment, it is due and may be made at any place where the creditor may be. The plaintiff would be entitled to claim payment in Spain, and the defendants might have tendered the amount due to the plaintiff there or wherever

(1) [1893] P. 119. (2) [1892] 1 Q. B. 753.

he might be. The case of *Bell & Co.* v. *Antwerp, London and Brazil Line* (1), shews that in such a case Order XI., r. 1 (*e*) does not apply. It is not enough that the contract may be performed within the jurisdiction. In order that the rule may apply, it must be so performed. It is most distinctly laid down in *Bell & Co.* v. *Antwerp, London and Brazil Line* (1) that, where the contract is performable either in or out of the jurisdiction, the case is not within the rule.

[A. L. SMITH, L.J. By the terms of this contract it would appear that the money was to be paid in English currency.]

[They also cited *Reynolds* v. *Coleman* (2), and *Fry* v. *Raggio.* (3)]

T. W. Chitty, for the plaintiff, was not called upon.

LORD ESHER, M.R. The question in this case turns upon the true construction of this contract with regard to the place of payment. The plaintiff is a civil engineer who carries on business in Newcastle. The nature of such an engineer's business is, it is true, not such that it can be carried on entirely at one place. He would draw plans and take out quantities there; and some portions of his business would have to be carried on at different places. But he would return again to Newcastle, and that is where his permanent place of business is situated.

In the case of the contract now in question, the necessary plans and calculations would be made at his place of business in Newcastle, though by the terms of the agreement he is to go out to Spain from time to time, for a short time, to see how the works which he has designed are being carried out. His remuneration is to be by a commission of 5 per cent. upon the total amount of the cost of the works, which is to be paid by instalments. A percentage of 1*l.* 10*s.* per cent. is to be paid upon the contract prices of each contract as and when it is made. These contracts will not necessarily be made in Spain. They may be made anywhere, in France or Italy or England, as the case may be. These payments are not to be made by the contractors or out of moneys to be paid to them. They are to be made by the defendants to the plaintiff. The remaining 3*l.* 10*s.* per cent. is

(1) [1891] 1 Q. B. 103. (2) 36 Ch. D. 453.
(3) 40 W. R. 120.

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to be paid subject to the retention of a part of it as the work goes on, and the ultimate payment is to be within seventy-five days after the completion of the works to the defendants' satisfaction. It is not stated in express terms where payment of these amounts is to be made. The question is whether, in the case of such a contract made with such a man, there is any, and if so, what implication as to the place where such payments were to be made. I think the implication is that they were to be made at Newcastle, where the plaintiff generally carried on business, and where the necessary plans and calculations for the works would be made. The suggestion that the defendants might tender the amount due at any remote part of the world, where the plaintiff might at the moment be, and where he might not have the means of ascertaining the correctness or otherwise of the amount tendered, does not appear to me to be correct. It seems to me that under this contract the plaintiff had a right to be paid at Newcastle, and, no other place of payment being named, the defendants were bound to pay him there. Of course, if he asked for or accepted payment elsewhere, such payment would be equivalent to payment under the contract; but I think that the contract, according to its true construction, is to pay at Newcastle. The money has not been paid, and consequently there is a breach of a contract to be performed at that place. For these reasons I think that this appeal should be dismissed.

LOPES, L.J. I am of the same opinion. The question that arises is whether the contract in this case was to be performed within the jurisdiction. That depends on the intention of the parties as appearing from the contract. I cannot come to any other conclusion than that, in the case of this contract, the intention of the parties was that payment should be made in Newcastle. It is true that there is no express provision as to the place of payment. Therefore we must draw the best inference we can as to the matter from the terms of the contract, and to some extent from the surrounding circumstances. I think that the reasonable inference in this case is that the payment was to be made in Newcastle, which is the place where the plaintiff carried on business, and where he would probably be

and could give a discharge for the moneys, or where he would have an agent who could. It was suggested that the payment might be tendered at any place, and that the plaintiff would be bound to take it, if so tendered. I do not think that is correct. When travelling about on his business, it cannot be supposed that he would be in a position to look into the figures and to ascertain whether the amount tendered was correct.

A. L. SMITH, L.J. I think that the true inference from this contract is that the payments to the plaintiff were to be in Newcastle, and that consequently according to its terms it was to be performed within the jurisdiction.

Appeal dismissed.

Solicitors for plaintiff: *Stibbard, Gibson & Co., for Gibson, Pybus & Pybus, Newcastle.*

Solicitors for defendants: *Maples, Teesdale & Co.*

E. L.

[IN THE COURT OF APPEAL.]

HILL *v.* COOPER.

Practice—Married Woman—Protection Order—Judgment against Married Woman—Equitable Execution—Interest subject to Restraint on Anticipation—Receiver—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.

A married woman who was entitled to an equitable life interest in the rents of certain premises, for her separate use without power of anticipation, was deserted by her husband, and obtained a protection order under the Matrimonial Causes Act, 1857, s. 21. She subsequently executed a mortgage of her life interest, covenanting to pay the mortgage debt. Judgment having been obtained against her as against a feme sole in an action on the covenant:—

Held, that, her life interest having devolved upon her before the desertion, the restraint on anticipation still attached, and consequently a receiver of her life interest could not be appointed by way of equitable execution on the judgment.

APPEAL from the decision of a Divisional Court (Wills and Charles, JJ.), dismissing an appeal from the refusal of a judge at chambers to appoint a receiver by way of equitable execution on a judgment in an action.

The facts appeared to be as follows. In 1869 the father of the

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defendant in the action died, having bequeathed certain leasehold premises to trustees on trust to pay the rents and profits thereof to his daughter, the defendant, for her life, for her separate use, without power of anticipation, with trusts over. The defendant afterwards married. In 1878 her husband deserted her, and in 1887 she obtained a protection order under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21, from a police magistrate. In 1889 she executed a mortgage of her life interest in the above-mentioned premises. The mortgage deed contained the usual covenant by her for the payment of principal and interest. The plaintiff, who was the transferee of such mortgage, had sued upon the covenant and recovered judgment against the defendant in the ordinary form as against a feme sole. The judgment being unsatisfied, the plaintiff applied to a judge at chambers to appoint a receiver of the rents and profits of the above-mentioned premises by way of equitable execution. The judge at chambers refused the application. On appeal to the Divisional Court they affirmed his decision. (1)

(1) By 20 & 21 Vict. c. 85, s. 21: "A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate . . . for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate . . . if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole . . . if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation."

Sect. 25: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that, if any such wife shall again cohabit with her husband, all such property as she may be entitled to when such cohabitation

Cozens-Hardy, Q.C., and *Butcher*, (*W. F. Phillpotts*, with them), for the plaintiff. The effect of s. 26 of the Matrimonial Causes Act, 1857, is that, for the purpose of contracting, and suing and being sued, the married woman who has obtained a decree of judicial separation or a protection order no longer has the status of a married woman, but is to be treated as a feme sole. While the separation continues, it is as if she were a widow for this purpose. Consequently the restraint on anticipation does not attach, and her interest in this property may be made available to satisfy the judgment by way of equitable execution. The section enables her to contract and to be sued, and it must have been intended that her property should be subject to execution like that of any other person who contracts and is sued on the contract. The scope of the section is that, having the advantages of the status of a feme sole as against her husband, she must take the disadvantages of it as regards liability to the general public. The provisions of this Act are not like those of the Married Women's Property Act, 1882, which only empowers a married woman to contract with reference to separate property. It has been held in *Waite* v. *Morland* (1) that s. 25 of the Act only applies to property that the married woman has acquired after the decree of separation; but that decision only concerned s. 25, and no question arose in that case as to the effect of s. 26.

[They also cited *Ramsden* v. *Brearley* (2); *Stogdon* v. *Lee* (3); *Tullett* v. *Armstrong*. (4)]

C. C. Scott, for the defendant. This case is really concluded by *Waite* v. *Morland*. (1) The defendant being a married woman, it is clear that her property cannot be available in execution,

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shall take place shall be held to her separate use, subject however to any agreement in writing made between herself and her husband whilst separate."

Sect. 26: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant."

(1) 38 Ch. D. 135.

(2) Law Rep. 10 Q. B. 147.

(3) [1891] 1 Q. B. 661.

(4) 4 M. & Cr. 377.

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except so far as it is made so by the Act. Sects. 21 and 25 of the Act are the only sections of the Act which deal with the property of a married woman who has obtained a protection order, and it has been held in *Waite* v. *Morland* (1) that the effect of those sections is confined to property acquired after the desertion or decree of judicial separation. Sect. 26 has nothing to do with property. It enables the married woman who has obtained a protection order or a decree of separation to contract, which she could not otherwise do, and to sue and be sued. But it does not enable her to give to others rights over property exceeding those which she has herself.

[He was then stopped.]

Cozens-Hardy, Q.C., in reply.

LORD ESHER, M.R. I think that this appeal must be dismissed. Notwithstanding the argument of the counsel for the plaintiff, I think the status of the defendant is still, generally speaking, that of a married woman. By the law of England that status involves certain rights and certain disabilities, which exist to a great extent for the protection of the married woman. The statute does not really destroy that status in cases that come within its provisions; it deals with the married woman as such, and makes special provision for certain cases which may arise with regard to her while a married woman. It provides, in s. 21, that, where she is deserted by her husband, she shall, under certain circumstances, be entitled to an order for the protection of herself and of her earnings and property from the husband who has so deserted her. The terms of that section are, however, expressly confined to earnings and property acquired by her since the commencement of the desertion, which are to belong to her as if she were a feme sole. By the concluding portion of the section it is enacted that, "If any such order of protection be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act, if she obtained a

(1) 38 Ch. D. 135.

decree of judicial separation." So the enactment of that section as to the position of the married woman with regard to property and contracts, and suing and being sued, is by reference to what comes after in ss. 25 and 26. Then, when we come to those sections, we find that they separate the things which in s. 21 were dealt with together—viz., property and contracts, and suing and being sued. Sect. 25 deals with property, and s. 26 with contracts, and suing and being sued. Sect. 25 enacts that, "in every case of judicial separation, the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole," not generally and for all purposes, but "with respect to property of every description which she may acquire, or which may come to or devolve upon her." It has been decided in *Waite* v. *Morland* (1) that these words mean property which she may acquire or which may come to or devolve upon her after the decree of separation or the desertion, as the case may be; and that they do not include property to which she may have become entitled in possession previously. Then, when we come to s. 26, we find that it has nothing to do with property. It relates to the other matters mentioned in s. 21—viz., contracts, and suing and being sued. It provides that "in every case of judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding." This section does not deal with property at all. Therefore, the case seems to come to this: This application concerns the property of the married woman, for it is an application that a receiver may be appointed of property belonging to her. Sect. 25, as we have seen, only applies to property which a married woman may have acquired, or which may have come to or devolved upon her after a decree of judicial separation or desertion, as the case may be. Sect. 26 has no application to property at all. The result is that, with regard to the property here in question, the defendant remains in the position of a married woman, and, therefore, the restraint on anticipation continues to apply. For these reasons I think the appeal should be dismissed.

(1) 38 Ch. D. 135.

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LOPES, L.J. I agree. The question here is as to the position of the defendant with regard to this property. To my mind, it is clear that she is still in the position of a married woman. A protection order has, it is true, been made, which has for certain purposes the same effect as a decree of judicial separation. But, except so far as the effect of such a decree extends, she still has the status of a married woman. Her interest in the property in question was that she had an equitable life estate in it for her sole and separate use, without power of anticipation. This restraint on anticipation attaches upon coverture, and exists as long as the coverture continues. Therefore, the defendant being a married woman, the restraint on anticipation would attach, unless the statute otherwise provides. The terms of the protection order made under the statute protected the defendant so far as concerned her earnings and property acquired since the commencement of the desertion. Further than that, by the terms of the 21st section of the statute, it could not go. The concluding part of that section provides that, "if any such order be made, the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act, if she obtained a decree of judicial separation." That provision refers us to the sections which deal with judicial separation—viz., ss. 25 and 26. Its words appear to me to draw a plain distinction between "property" and "contracts, and suing and being sued." The former is dealt with by s. 25, the latter are dealt with by s. 26. I should have thought it clear, if there had been no authority on the subject, that the words of s. 25 only applied to property acquired by the married woman, or which had come to or devolved upon her since the decree for separation or the desertion, as the case might be; but it is not necessary for me to deal with the interpretation of that section, as it has received judicial interpretation in the case of *Waite* v. *Morland* (1), in which case it was held by the Court of Appeal that the section only applied to such property as I have just mentioned. The interpretation so put on s. 25 really appears to me to conclude this case. It is

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sought by this application to deal with property of a married woman—*i.e.*, to enforce a judgment against it; and, unless such property can be brought within s. 25, it seems to me clear that the application must fail; for I agree with the Master of the Rolls that s. 26 does not in any way refer to the married woman's property. I should wish to call attention to the proviso at the end of s. 25, which provides that, in the event of the resumption of cohabitation, the property mentioned in the section shall be held to the separate use of the wife; for it appears to me most conclusively to meet the argument that the effect of the Act is to take away the status of marriage, and to shew that it continues to exist after the protection order is made.

A. L. SMITH, L.J. The question to be determined in this case involves the point as to whether the defendant, being a married woman, could validly mortgage her interest in property vested in trustees and settled to her separate use without power of anticipation, as if there were no such trust and she were a feme sole. If she could, then it seems to me a receiver should be appointed: aliter if she could not. It is quite clear that, unless the statute can be brought into play, she could not do so. The effect of the Act appears to me to be tolerably plain. It first of all provides in s. 21 that a married woman, if deserted by her husband, may get a protection order, by which her earnings will be protected. The section goes on to provide that, if such an order is made, the wife shall be in a like position with regard to property and contracts, and suing and being sued, as if she had obtained a decree of judicial separation. In this case the defendant obtained a protection order, and therefore was in the same position as if she had obtained such a decree. Then s. 25 deals with property of a married woman who has obtained a decree of judicial separation. It has been decided in *Waite* v. *Morland* (1), that it is only as regards property acquired by the wife, or which has come to or devolved upon her, after the decree of separation or the desertion, as the case may be, that in such a case she is to be considered as a feme sole. With regard to all other property she remains in the position of a married woman.

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A. L. Smith, L.J.

The property here in question, not being property acquired by the defendant or which had come to or devolved upon her after the desertion, is not within s. 25, and, therefore, so far as that section is concerned, it appears to me clear that she could not validly deal with it by mortgage or otherwise by way of anticipation. But it is argued that s. 26 enables her to contract as a feme sole, and, as she could contract, she could therefore in effect charge her separate property notwithstanding the restraint on anticipation. I think that, as under s. 25 she is only to be considered a feme sole as regards property acquired after the decree of separation or desertion, so it is only as regards that property she can contract. She can contract, as she has done in the present case, by covenanting to pay the mortgage debt; but s. 26 does not enable her to contract as if she were a feme sole so as to affect property to which she became entitled for her separate use without power of anticipation before her desertion by her husband. After-acquired property she may bind as if she were a feme sole, but not the property now in question. For these reasons I agree that the appeal should be dismissed, and that a receiver ought not to be appointed.

Appeal dismissed.

Solicitor for plaintiff: *E. H. Goddard.*
Solicitor for defendant: *E. B. Lawes.*

E. L.

BUCKLEY *v.* HULL DOCKS COMPANY.

1893
May 16.

Practice—Local Venue provided by Statute—Abolition of Local Venues—Order XXXVI., *r.* 1.

By Order XXXVI., r. 1, "There shall be no local venue for the trial of any action, except where otherwise provided by statute":—

Held, that, all existing local venues having been abolished by the Judicature Act, 1875, the exception in Order XXXVI., r. 1, operates only in favour of local venues created by statutes passed since the Judicature Act, 1875, and does not have the effect of reviving local venues created by statutes passed prior to that Act.

POINT of law raised on the pleadings.

By the Hull Docks Act, 1774 (14 Geo. 3, c. lvi.), it was provided that any action or suit for anything done in pursuance of the Act should be laid and brought in the county of the town of Kingston-upon-Hull. At the time when the Hull Docks Act, 1774, was passed assizes were held at Hull from time to time if there were sufficient causes for trial. But such assizes were discontinued in 1794. There was also in 1774, and still is, a Local Court of Record at Hull having unlimited jurisdiction. The plaintiff having brought an action in the High Court against the defendants in respect of matters which were admitted to be done in pursuance of the said Act, and the statement of claim having named York as the place of trial, the defendants pleaded that the action ought to have been laid and brought in Hull, as required by the above section. The question of the sufficiency of that defence was set down for argument before trial.

Scott Fox, for the defendants. The action should have been brought in the Local Court of Record. The Hull Docks Act said that the action should be brought in Hull, that is, either at the assizes (if any), or in the local Court, and there are no assizes held now at Hull. The rules of the Judicature Act, even if it be assumed that they abolish statutory local venues, apply only to actions brought in the High Court, and do not operate to deprive a defendant of the benefit of requiring an action to be brought in a local inferior Court of competent jurisdiction.

Secondly, if the defendants have still a right to sue in the

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superior Court they must nevertheless lay the venue at Hull, for the rules of the Judicature Act do not abolish statutory local venues. They are expressly excepted by Order XXXVI., r. 1, of the Rules of 1883, which provides that "there shall be no local venue for the trial of any action except where otherwise provided be statute." No doubt the action cannot be tried at Hull, there being no assizes there at which to try it; but the plaintiff must lay his venue there and then apply for an order for a trial in Yorkshire, under s. 1 of 38 Geo. 3, c. 52, which provides that, in actions in any Court of Record at Westminster, if the venue is laid in the county of any city or town corporate, the Court may direct the issue to be tried by a jury of the county next adjoining. The fact that the effect of such an order would be to cause the action to be tried elsewhere than at Hull does not relieve the plaintiff from the necessity of laying the venue at Hull in the first instance.

Montague Lush, for the plaintiff. The local venue provided by the Hull Docks Act no longer exists. Order XXXVI., r. 1, of the Rules of 1875, for which the corresponding rule of the Rules of 1883 was substituted, contained no exception in favour of statutory local venues, but simply said that "there shall be no local venue for the trial of any action." The Rules of 1875 were contained in a schedule to and formed part of the Judicature Act of 1875, and by s. 33 of that Act any enactment inconsistent with that Act was repealed. The effect was to repeal so much of the Hull Docks Act as created a local venue. From 1875 down to 1883 the local venue in question was clearly gone, and the exception in favour of statutory local venues introduced into Order XXXVI., r. 1, of the Rules of 1883 does not operate to revive it, for by s. 6 of the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), "No enactment repealed by virtue of s. 33 of the Judicature Act, 1875, shall be revived by reason of the annulment or alteration by any new Rules of Court of the Rules contained in the first schedule to that Act." This is the view of the effect of the rule taken by the editors of Wilson's Judicature Act, 7th ed., p. 284. No doubt the exception in the rule of 1883, if read as applying to future statutes, would be idle and superfluous, but sufficient meaning will be

given to it, if it be treated as applying to local venues (if any) provided by statutes passed in the interval between 1875 and 1883.

Secondly, the effect of the Act of 38 Geo. 3, c. 52, is that the laying of the venue in Yorkshire is equivalent to laying the venue at Hull. But if it be necessary as matter of form to lay the venue at Hull, the Court is asked to amend, and then at once make an order for the removal of the trial from Hull to York.

Scott Fox, in reply. The Court has no power to amend, for the statement of the place of trial is not part of the pleading within the meaning of the rule as to amendment, Order XXVIII., r. 1: *Locke* v. *White*. (1) A plaintiff who lays the venue in the wrong place is bound to discontinue and begin afresh.

POLLOCK, B. The question is whether the enactment in the Hull Docks Act, 1774, which provides that actions for anything done in pursuance of that Act should be laid and brought in Hull, is still in force. It was clearly repealed by s. 33 of the Judicature Act, 1875, being inconsistent with Order XXXVI., r. 1, in the schedule to that Act. But then it is contended that it has been revived by virtue of Order XXXVI., r. 1, of the Rules of 1883, which was substituted for the former rule, and which contains the qualification that there may be a local venue where provided by statute. I do not agree. I am prepared to adopt the conclusion arrived at in the note to Wilson's Judicature Act, 7th ed., p. 284, that that qualification applies only to statutes passed since 1875, and does not operate to revive repealed statutes. The plaintiff must have judgment on the issue raised by the defence.

KENNEDY, J., concurred.

Solicitors for plaintiff: *Bell, Brodrick, & Gray, for Woodhouse, Hull.*

Solicitors for defendants: *Collyer-Bristow & Co., for Laverack & Son, Hull.*

(1) 33 Ch. D. 308.

J. F. C.

C. A.
1893
May 31.

[IN THE COURT OF APPEAL.]

ST. GOBAIN, CHAUNY AND CIREY COMPANY *v.* HOYERMANN'S AGENCY.

Practice — Jurisdiction — Foreign Defendant — Person carrying on Business within the jurisdiction in name or style other than his own—Service of Writ—Order XLVIIIa., *rr.* 3, 11.

Rule 11 of Order XLVIIIa. provides that "any person carrying on business within the jurisdiction in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply":—

Held, that the rule did not apply to a foreign subject resident out of the jurisdiction who carried on business within the jurisdiction in a name or style other than his own name.

APPEAL from a decision of the Queen's Bench Division.

The writ of summons in the action was indorsed with a claim for damages for the non-delivery by the defendant to the plaintiffs of 400 tons of sulphate of ammonia, under a contract for sale made between the plaintiffs and the defendant on December 16, 1892. The plaintiffs were a French firm of chemical manufacturers carrying on business at Paris, with a depot in London. The defendants named in the writ were "Hoyermann's Agency." The sole proprietor of the business, which was also that of a chemical manufacturer, was Gerhard Hoyermann, a foreigner resident in Hanover, who had never resided within the jurisdiction. His business of manufacturing chemicals was carried on in Hanover, under the name "Phosphatfabrick, Hanover," and he had also an office at Mark Lane, in the city of London, where orders for goods were taken, and sales effected, by a manager employed by him. Upon the outside door of the office at Mark Lane were the words "Hoyermann's Agency, Phosphatfabrick, Hanover." The contract for the breach of which the action was brought was signed by the defendant's manager in Mark Lane. The writ was served by the plaintiffs' solicitors upon the defendant's manager at the office in Mark Lane. The defendant thereupon took out a summons to set aside the service, and a master having made an order setting aside the service,

Grantham, J., at chambers, affirmed his order. On appeal, a Divisional Court (Wills and Charles, JJ.) affirmed the decision of Grantham, J., on the ground that they were bound by the decision (then under appeal) of a Divisional Court, in *De Bernales* v. *New York Herald.* (1)

The plaintiffs appealed.

(1) *De Bernales* v. *New York Herald* was argued before a Divisional Court on March 20 and 23, 1893, and judgment was delivered on April 11.

Appeal from a decision of Kennedy, J., at chambers.

The action was brought to recover damages for a libel alleged to have been published of the plaintiff in a newspaper called the *New York Herald.* The defendant named in the writ of summons was the *New York Herald.* The original claim indorsed on the writ was for damages only, but the indorsement was amended by adding a claim for an injunction to restrain the defendant from publishing or causing to be published within the jurisdiction any further libels or defamatory statements concerning the plaintiff.

The following facts appeared from the affidavits made by or on behalf of the parties:—

The *New York Herald* is a newspaper printed and published in America, the office of the paper being in New York. James Gordon Bennett is the sole proprietor of the newspaper, and he is an American citizen permanently residing in Paris. The newspaper is sold at an office taken by James Gordon Bennett in Northumberland Avenue, London, which office is also used for the purpose of collecting information and telegraphing it to Paris and New York. The newspaper containing the alleged libel was bought at the office in Northumberland Avenue, and on the first sheet were printed the words "James Gordon Bennett, Proprietor. London Office, Trafalgar Buildings, Northumberland Avenue." The words "*The New York Herald,*" printed on the door leading to the office in Northumberland Avenue, are the only indications of the name or style of the business carried on there.

Several efforts having been made, without success, to serve the writ at the office in Northumberland Avenue upon the manager, or upon some person having control of the business, the plaintiff applied for an order for substituted service by sending the writ to the office in a registered letter. A master having made the order, on appeal Kennedy, J., reversed it.

The plaintiff appealed.

The learned judge also referred to the Court an application made to him at chambers for leave to serve notice of the writ upon the defendant out of the jurisdiction.

Percy Gye, for appellant.
Temple Franks, for respondent.

Cur. adv. vult.

1893. April 11. LOPES, L.J., read the following judgment:—

The learned judge refused to allow substituted service. I am of opinion that he was right. The writ is issued against the *New York Herald.* The sole proprietor of that newspaper is Gordon Bennett, an American citizen residing in Paris. I regard the name of the *New York Herald* as an alias for the name of Gordon Bennett, and I deal with the case as if the writ was

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Vennell, for the plaintiffs. The affidavits shew that the defendant is a person carrying on business within the jurisdiction issued against Gordon Bennett individually. The object of issuing the writ against the *New York Herald* is obvious; it is an attempt to bring the case within the language of Order XLVIIIA., r. 11, with which I will presently deal. Independently of that order, the case is in all fours with *Field* v. *Bennett* (56 L. J. Q. B. 89), where it was held that substituted service cannot be allowed when personal service is impossible. Personal service is impossible here. The learned judge was right, therefore, in setting aside the order for substituted service. But it is said the code of rules contained in Order XLVIIIA. has enlarged the jurisdiction of the Courts by including foreign firms within their scope. It is unnecessary in this case to express any opinion as to the effect of these rules on the joint property in this country of a foreign firm carrying on business here. The *New York Herald* is not a foreign firm. It is not a firm at all. The *New York Herald* is the alias in this country for Gordon Bennett. Gordon Bennett is an American citizen residing in Paris. But the rule relied on is rule 11 of Order XLVIIIA., which is in these terms:—"Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."

I cannot think that the authors of this rule intended that service might be effected on an individual foreigner permanently residing abroad simply because he carried on business in this country under an assumed name, when it could not have been effected upon him if he carried on business here in his own name. The code of rules contained in Order XLVIIIA. are difficult to understand, but whatever their effect and meaning may be, I decline to put upon them a construction to my mind so unreasonable as this. This point therefore fails. The learned judge was asked in another summons to give leave for service of a notice of writ on the defendant under Order XI., r. 1 (f.), on the ground that an injunction was claimed. The writ, as originally issued, had not claimed an injunction, but had been subsequently amended. This summons was referred to the Court. I think leave should not be given, and for these reasons:—I do not believe the claim for an injunction is made bonâ fide, but merely to bring the case within Order XI. There is no evidence of any apprehended repetition of the libel, and indeed having regard to the circumstances it is most improbable that it will be repeated. An injunction, if granted, would not be made effectual against the defendant, who is out of the jurisdiction. The giving leave to serve notice of writs out of the jurisdiction is a matter of judicial discretion. We should not, in my opinion, be properly exercising that discretion if we gave leave in this case. The appeal against the refusal of the learned judge to allow substituted service will be dismissed with costs, and the application for leave to serve notice of writ be refused with costs.

LORD COLERIDGE, C.J. I concur

in a name or style other than his own name. He is therefore brought within Order XLVIIIa, r. 11, and may be sued in the name of Hoyermann's Agency. The concluding words of the rule, "and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply," enable service to be effected upon his manager under rule 3. (1) Order XLVIIIa. contains a new code replacing the former rules 6 and 7 of Order IX. with respect to the right to sue and to serve members of firms. The rules of the new code apply to all members of firms, whether they are foreigners resident out of the jurisdiction or not. By virtue of the concluding words in rule 11 that rule may be construed by referring to all the rules of Order XLVIIIa. In rule 1, which enables co-partners to be sued in the firm name, and replaces the old rule 14 of Order XVI., the words are inserted "and carrying on business within the jurisdiction." This alteration, it is contended, was for the purpose of enlarging the right of plaintiffs, and has the effect of enabling them to bring within the jurisdiction, under rules 3 and 11, a foreigner resident abroad who carries on business within the jurisdiction in a name or style other than his own name. In *O'Neil* v. *Clason* (2) a Divisional Court

entirely in the judgment delivered by Lord Justice Lopes.

The plaintiff appealed against so much of the judgment of the Divisional Court as affirmed the refusal of the judge at chambers to allow substituted service of the writ.

1893. May 8. The Court of Appeal (Lord Esher, M.R., Lindley and A. L. Smith, L.JJ.) dismissed the appeal on the ground that, on the facts stated in the affidavits, the defendant did not carry on business in Northumberland Avenue in a "name or style other than his own name," so as to be brought within Order XLVIIIa., r. 11.

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(1) Order XLVIIIa., r. 3: "Where persons are sued as partners in the name of their firm under rule 1, the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary; provided that in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable."

(2) 46 L. J. (Q.B.) 191.

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held, under the old rule 7 of Order IX. (which was similar in terms to rule 11 of Order XLVIIIa.), that service upon the defendant's manager was good even although the defendant was a foreigner resident out of the jurisdiction. That case was overruled by the Court of Appeal in *Russell* v. *Cambefort* (1), but it is submitted that by the alteration made in rule 1 of Order XLVIIIa. it was intended to restore the effect of *O'Neil* v. *Clason*. (2) The new rules of Order XLVIIIa. were made after the decision in *Russell* v. *Cambefort* (1), which was a decision upon the old rule 6 of Order IX. corresponding to the new rule 3 of Order XLVIIIa. *Russell* v. *Cambefort* (1) does not apply to the new code of rules in Order XLVIIIa. It is submitted also that the decision of the Divisional Court in *Grant* v. *Anderson* (3) was wrong. The principle of the new rules is that where a foreigner is allowed to gain benefits by carrying on business at a fixed place within the jurisdiction, and so obtain the protection of the English law in respect of that business, he should be liable to be served with process by serving his manager or agent at his place of business in respect of contracts made in the course of that business. See observations of Chitty, J., in *Shepherd* v. *Hirsch, Pritchard, & Co.* (4) [He also referred to *Pollexfen & Co.* v. *Sibson & Co.* (5) and *Haggin* v. *Comptoir d'Escompte de Paris.* (6)]

Scrutton, for the defendant. If the contention made for the plaintiffs be adopted, the curious result will follow that, if a foreigner resident abroad carries on business within the jurisdiction in a name or style other than his own name, he can be brought within the jurisdiction, though he cannot if he carries on the business in his own name. The principle of the decision in *Russell* v. *Cambefort* (1) governs this case. Order XLVIIIa., r. 11, is practically the same as Order IX., r. 7. The alteration in the new rules was made in order to get rid of the decision in *Indigo Company* v. *Ogilvy* (7), and also to meet cases in which some of the members of a firm were British subjects and others foreigners. In such cases a plaintiff can, under rules 1 and 8 of

(1) 23 Q. B. D. 526.
(2) 46 L. J. (Q.B.) 191.
(3) [1892] 1 Q. B. 103.
(4) 45 Ch. D. 231, at p. 233.
(5) 16 Q. B. D. 792.
(6) 23 Q. B. D. 519.
(7) [1891] 2 Ch. 31.

Order XLVIIIa., issue execution against any property of the partnership within the jurisdiction. Rule 11 does not apply to a single foreigner resident out of the jurisdiction. It was passed in order to meet the case of a person carrying on business in a name other than his own which was not the name of a firm apparently consisting of more than one person. Rule 1 of Order XLVIIIa. has no application here, and rule 11 cannot be construed by reference to it, because it deals with a different subject-matter, namely, where "any two or more persons" carry on business as partners. The principle of *Russell* v. *Cambefort* (1) has been followed in *Western National Bank of City of New York* v. *Perez Triana & Co.* (2), in *Heinemann & Co.* v. *Hale & Co.* (3), in *Shepherd* v. *Hirsch, Pritchard, & Co.* (4), and in other cases.

Vennell, replied.

LORD ESHER, M.R. In this case a contract was made between the plaintiffs and the defendant, both parties being foreigners. I come to the conclusion that the defendant does carry on his business in England. He is a manufacturer of chemicals in Germany, and he manufactures the chemicals for the purpose of selling them. Part of his business, therefore, is to sell that which he has manufactured, and accordingly he has an office in England in which he makes contracts for sale through a person employed in that office, who makes them by the authority of the defendant and for him. The contract for sale for the breach of which the action was brought was so made by that person. The defendant is the only person who is owner of that business, and he is a person not domiciled in England, but resident abroad, and he was so at the time of action brought. The action was brought against him not in his own name, but in the name or style in which he carries on business in England. If, therefore, he were an English subject, he would be within Order XLVIIIa., r. 11, "as carrying on business within the jurisdiction in a name or style other than his own name." That he certainly did. But if he were an English subject he would

(1) 23 Q. B. D. 526.
(2) [1891] 1 Q. B. 304.
(3) [1891] 2 Q. B. 83.
(4) 45 Ch. D. 231.

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not come within rule 1 of Order XLVIIIa., because he is not a corporation; nor is he one of "two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction." If he comes within any of the rules of Order XLVIIIa., it must be rule 11, which is: "any person carrying on business within the jurisdiction in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply." The words "any person" are of course large enough to include a foreigner, and a foreigner who is resident abroad, and to include one who has never been in England in his life, and has never had what has been called the protection of the English law, and merely carries on business in England by his agents. But the question is, ought the Court to give an interpretation to the words which would include such a person? If the rule had contained words expressly in terms including a foreigner resident abroad, then an English Court would be bound to obey the directions of its own legislature, but when the words used are capable of one or other construction, then the Court ought to adopt the construction which will prevent an infringement upon the principles of international law by extending the jurisdiction of the English Courts against foreigners residing abroad, who have in no way submitted to that jurisdiction. That rule was laid down by the Court of Appeal in *Russell* v. *Cambefort*. (1) Cotton, L.J., in that case pointed out the reasons for it, and gave the canon of construction. He said: "Although the rule does authorize service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships, the members of which either by their nationality or residence have become subject to English law, and to the power of Parliament." Then he dealt with the case of *Haggin* v. *Comptoir d'Escompte de Paris* (2), and drew a distinction between a corporation and a private partnership. He proceeded to say: "It may be that the defendants can be served under Order XI., but on that I give no opinion. What I say is that they cannot be served under Order IX., r. 6, and

(1) 23 Q. B. D. 526. (2) 23 Q. B. D. 519.

that they cannot be served as within the jurisdiction. It may be true that our Courts assume jurisdiction over foreign subjects in respect of certain contracts if broken in a particular way, and also in matters relating to land in this country, and in these cases leave is given to serve foreigners out of the jurisdiction of this country. But, in my opinion, we ought not to construe the rule so as to bring within the jurisdiction persons who neither by nationality, nor by residence, are capable of being made subject to the jurisdiction." Now, *Russell* v. *Cambefort* (1) which overruled *O'Neil* v. *Clason* (2), decided in terms that under a similar rule to rule 11 of Order XLVIIIa., where there is a single foreigner resident abroad, although he does carry on business within the jurisdiction, the rule does not apply, because the effect would be to make the English Parliament assume jurisdiction over a foreigner wholly resident abroad. *Russell* v. *Cambefort* (1) has never been overruled. On the contrary, it has been recognized as a binding authority by Chitty, J., in *Shepherd* v. *Hirsch, Pritchard & Co.* (3); by Lord Coleridge, C.J., and Wright, J., in *Grant* v. *Anderson* (4), and by this Court in *Western National Bank of City of New York* v. *Perez, Triana & Co.* (5) It was urged by the appellants' counsel in the present case, that the effect of rule 11 of Order XLVIIIa. had been altered by reason of the alteration introduced into rule 1 of the same order. Of course, if rule 11 had been so altered as to have the same effect as if express words—such as, "whether a British subject or a foreigner resident abroad"—had been introduced after the words "any person," then the limited construction which I put upon the rule could not be applied. But rule 1 deals with a different case to that dealt with by rule 11, because rule 1 deals with the case of "two or more persons . . . . carrying on business within the jurisdiction," whilst rule 11 deals with the case of a single person carrying on business within the jurisdiction in a name or style other than his own name. It was said that the words in rule 1, "carrying on business within the jurisdiction," must be read into rule 11, by virtue of the concluding words

(1) 23 Q. B. D. 526.
(2) 46 L. J. (Q.B.) 191.
(3) 45 Ch. D. 231.
(4) [1892] 1 Q. B. 108.
(5) [1891] 1 Q. B. 304

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of that rule, and had the effect of altering the effect of it. But the words "carrying on business within the jurisdiction" are already in rule 11; you cannot read them in over again, and the similar rule, with those words in it, had already been construed not to include a foreigner resident abroad before the alteration was made in rule 1. The alteration, therefore, in rule 1 could not affect the construction already given in *Russell* v. *Cambefort* (1) to the similar rule to rule 11. We need not express an opinion whether the case of a firm carrying on business within the jurisdiction, all the members of which were foreigners residing out of the jurisdiction, would come within rule 1. Our decision need only be with respect to the case of a single person under rule 11. I think that the latter words of rule 11, so far from strengthening the argument for the appellants, have rather the contrary effect, because rule 1 is part of a scheme by which partnership assets are to be dealt with as distinguished from personal assets. If that be so, it is obvious that the provisions of rule 1 could not be made applicable to the case of a single person dealt with by rule 11. Therefore, the words at the end of rule 11, "and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply," shew that you are not to read into that rule provisions applicable to a case in which partnership assets, as distinguished from personal assets, come into question. If the construction of rule 11 contended for were to prevail, a single foreigner carrying on business within the jurisdiction in a name or style other than his own name would be treated more harshly by English law than if he were a member of a foreign firm, because he would be made liable to the extent of all his property, whilst in the case of partners the partnership assets only could be made available on a judgment. For these reasons, I am of opinion that rule 11 of Order XLVIIIa., does not apply to this case, and, therefore, that rule 3 does not apply. The appellants, therefore, in order to succeed in their object, must bring the case within Order XI., and there seem to be no circumstances which enable them to do so. The judgment of the Divisional Court was right, and must be affirmed.

(1) 23 Q. B. D. 526.

A. L. SMITH, L.J. I am of the same opinion. There is evidence, which I accept, that the defendant carries on business at Mark Lane, in the City of London. It is also proved that he is the sole person in the business, and that he is a foreigner domiciled abroad. The question for our decision is whether, an action having been brought against him for breach of contract, he can be brought within the jurisdiction under the rules of Order XLVIIIA., or whether he must be proceeded against, if at all, under Order XI. If this Court holds that the defendant can be brought within the jurisdiction under rule 11 of Order XLVIIIA., the striking result will follow that he can only be cited within the jurisdiction because he carries on business here under the name of an agency; whereas, if he carried on the business in his own name, he could not be cited within the jurisdiction. It is said that a new jurisdiction over foreigners has been given by the new code of rules in Order XLVIIIA. We have not to decide whether a firm of foreigners resident abroad can be brought within any of those rules; we have only to construe rule 11, which applies to a single person carrying on business within the jurisdiction in a name or style other than his own name. I think also that we have not to put any new construction upon the rules, because the old rules upon which *Russell* v. *Cambefort* (1) was decided, were nearly identical with the new. The old rule—Order IX., r. 7—provided that "where one person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there." The new rule (Order XLVIIIA., r. 11) is with respect to "any person carrying on business in a name or style other than his own name." The alteration was made to meet cases such as that of a man carrying on business under a name or style which did not indicate a firm apparently consisting of more than one person—such as the name "Waukenphast." In my opinion the decision of the Court of Appeal, in *Russell* v. *Cambefort* (1), on the old rules of Order IX., really settles

(1) 23 Q. B. D. 526.

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this case. Bowen, L.J., in *Western National Bank of City of New York* v. *Perez, Triana & Co.* (1), says of *Russell* v. *Cambefort* (2): "The judgment of the Court of Appeal was, however, based expressly on the view that Order IX., r. 6, was not intended to govern writs directed against foreign firms, none of whose partners were resident or domiciled in England, and I do not think we should be carrying out the real view of the law so laid down, if we were to seek to distinguish the case of service effected on a partner under one portion of the rule from that of service effected on a manager under the other portion of it. We are therefore, I think, bound to apply the same reasoning to both cases." It was said in argument that rule 1 of Order XLVIIIa. had been altered by introducing the words, "and carrying on business within the jurisdiction," and that it was intended to bring in the case of a single foreigner carrying on business within the jurisdiction. But those words, in my opinion, were interpolated for a very obvious reason. Rule 3 of Order XLVIIIa. provides that service upon one or more of the partners "shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not." The object was to affect with service a member of the firm out of the jurisdiction, and rule 1 was altered in order to make it fit in with rule 3, but it was not intended in any way to alter rule 11.

I am of opinion that the present case is not brought within rule 11. This appeal should, therefore, be dismissed.

Appeal dismissed.

Solicitors for appellants: *Poole & Robinson.*

Solicitors for respondent: *MacDiarmid & Teather.*

(1) [1891] 1 Q. B. 304. (2) 23 Q. B. D. 526.

W. A.

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Practice—Change of Parties—Death of One of several Defendants—Action remitted to County Court—Application to compel Plaintiff to proceed—Jurisdiction—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*Rules of the Supreme Court*, 1883, *Order* XVII., *r.* 8.

Where an action has been remitted to the county court under 51 & 52 Vict. c. 43, s. 65, all subsequent proceedings must be taken in the county court, and the High Court has no jurisdiction.

One of several defendants, whom it was sought to make severally liable on a contract, died intestate shortly after delivery of defence. Afterwards, but before appointment of an administrator, the plaintiffs obtained an order under 51 & 52 Vict. c. 43, s. 65, remitting the action to the county court. The action was tried in the county court, and judgment was given for the surviving defendants. An administrator to the deceased defendant was appointed, and applied under Order XVII., r. 8, to compel the plaintiffs to proceed against the administrator, or in default for judgment:—

Held, that, the action having been remitted to the county court, all proceedings must be taken in that Court, and the High Court had no jurisdiction to make an order.

APPLICATION on behalf of Mr. Nicholson, who had been appointed administrator of the deceased defendant Lowry, to compel the plaintiffs to proceed with the action against Nicholson, or in default that judgment might be entered for the defendant. (1)

The action was commenced in the High Court against five defendants, of whom Lowry was one, and who were directors of a tramway company, seeking to make them severally personally liable on a contract. On July 21, 1891, Lowry delivered a defence, and three days later he died intestate, and no administrator was then appointed. Afterwards the plaintiffs obtained an order under the County Courts Act, 1888 (51 & 52 Vict. c. 43),

(1) By the Rules of the Supreme Court, 1883, Order XVII., r. 8: "When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or the person entitled to proceed) to proceed within such time as may be ordered; and in default of such proceeding judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued."

The words of the marginal note to this rule in the Annual Practice are, "Death of sole plaintiff or defendant."

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s. 65, remitting the action to the county court. A letter was then written by the solicitors for the plaintiffs to the solicitors who had acted for Lowry, containing the following statement: "This action is remitted to the county court as against all the defendants except your client." The action was tried in the county court, and the surviving defendants appeared and defended, and judgment was given in their favour. Afterwards Nicholson, having been appointed administrator of the estate of Lowry, made the application above mentioned by summons, and Wills, J., referred the matter to the Court.

Cababé, in support of the application. Reliance was placed at chambers on the words "sole plaintiff or defendant" in the marginal note to Order XVII., r. 8, in the Annual Practice, as shewing that that rule could not apply; but those words should be disregarded, for the marginal note is no part of the rule.

[BRUCE, J. The marginal note is different in Wilson's Judicature Acts, 7th ed. p. 197.]

If a plaintiff in a remitted action will not proceed, the defendant can apply to the High Court to make him do so: *Reg.* v. *Holroyd.* (1) When the defendant Lowry died, the action, so far as he was concerned, was abated or suspended, and no step could be taken which could in any way affect his interest until after an administrator had been appointed. Consequently, either the order remitting the action was invalid, or it was valid only as against the surviving defendants, and in either case could have no effect to prevent Lowry's administrator from making the present application: *Lloyd* v. *Dimmack* (2); *Eldridge* v. *Burgess* (3); *In re Shephard*; *Atkins* v. *Shephard.* (4) The letter of the plaintiffs' own solicitors shews that the order was not intended to have any effect as regards Lowry.

Lowe, for the plaintiffs. The application ought to have been made to the county court, for since the action has been remitted the High Court can have no jurisdiction. The words of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65, are express

(1) 32 W. R. 370; S. C. *nom. Driscol* v. *King*, 49 L. T. (N.S.) 599.
(2) 7 Ch. D. 398.
(3) 7 Ch. D. 411.
(4) 43 Ch. D. 131.

as to this: "The action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein." It is clear from the judgments in *Harris & Sons* v. *Judge* (1) that those words deprive the High Court of jurisdiction. The action is wholly remitted, and nothing is left in the High Court.

Cababé, replied.

GRANTHAM, J. In this case we are of opinion that the plaintiffs are entitled to succeed, on the ground that the application is made to the wrong Court. Although a great number of questions have from time to time arisen as to the nature and position of actions remitted to the county court, this appears to be the first time that this particular point has arisen. I am of opinion that an application cannot properly be made to the High Court to dismiss or continue the action as against the administrator of a deceased defendant. It is only necessary to read the words of Order XVII., r. 8, in order to see that it is not applicable to the present case. It is immaterial, so far as the present case is concerned, whether the marginal note to that rule in the Annual Practice is or is not correct. It may perhaps be correct to say that, if the action had not been remitted, Order XVII., r. 8, would cover the case. But the action has been remitted, and before it was remitted one of the defendants was dead. The question then is, What is the position of the present applicant, who since the action was remitted has been appointed administrator to the deceased defendant? It may be that the action ought not to have been remitted to the county court when it was; but the action was remitted, and has become as if the writ had been a county court summons, and nothing is left in the High Court. The action was tried in the county court, and the surviving defendants were successful. What, then, is the position of the administrator of the deceased defendant? Mr. Cababé contends that he can come to this Court, and apply for an order that the action be proceeded with or dismissed as against him. But the answer to that contention is that the case has been taken

(1) [1892] 2 Q. B. 565.

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Grantham, J.

from us altogether, and is now in the county court. The administrator, therefore, must follow the writ, and go to the county court to obtain the order which he requires. Mr. Cababé relies on the case of *Reg.* v *Holroyd*. (1) But in that case Mathew, J., said: "Technically the action remains in the superior Court until the order is lodged with the registrar, and if there is any delay the proper course is for the defendant to apply at chambers for an order that the plaintiff proceed, or that the action be dismissed for want of prosecution." (2) Mr. Cababé contends that the act of lodging the order with the registrar is only a ministerial act; but I do not agree with that contention, and the judgment which I have quoted is to the contrary effect, for it shews that, before the order remitting the action was lodged with the registrar, the applicant might have come here. But the action is now in the county court, and there is nothing on which our order can operate. In *Harris & Sons* v. *Judge* (3), Lindley, L.J., said: "The question is whether a judge of the High Court has any jurisdiction to make any order in an action which was commenced in the High Court, but which was transferred to the county court before it came before him." (4) The question, therefore, in the present case is whether we have power to make any order; but the Lord Justice, in the same judgment, goes on to point out that there is no such power, for he says: "This section expressly says that, after the action has been transferred to the county court, 'the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein.' I cannot myself read these words in any sense which leaves any jurisdiction in the High Court. Every application which can properly be regarded as a proceeding in the action must be taken in the county court, as if the action had been originally commenced therein." (5) In the same case Bowen, L.J., who at first took a different view, ultimately came to the same conclusion. In my opinion, we are bound by *Harris & Sons* v. *Judge* (3) to hold that the action, being remitted to the county court, is gone, and we have no

(1) 32 W. R. 370; S.C. *nom. Driscol* v. *King*, 49 L. T. (N.S.) 599.
(2) 49 L. T. (N.S.) at p. 600.
(3) [1892] 2 Q. B. 565.
(4) [1892] 2 Q. B. at pp. 567, 568.
(5) [1892] 2 Q. B. at p. 568.

jurisdiction to make any order. The application must, therefore be dismissed.

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BRUCE, J. I reluctantly take the same view. The whole case depends on whether the action has been remitted to the county court. Mr. Cababé contends that, although as regards the other defendants it may have been remitted, yet, as regards the defendant who has died, it is to be treated as not having been remitted. There may have been some irregularity in making the order remitting the action; but the whole action has been remitted, for it cannot be that part of the action has been remitted to the county court, while part remains in the High Court. By the words of the statute, all subsequent proceedings are to be taken in the county court, and therefore nothing is left in the High Court. Where the action has been remitted, the whole of the action is gone from the High Court, and we have no jurisdiction.

Application dismissed.

Solicitors for plaintiffs: *Crowders & Vizard.*
Solicitors for defendants: *Swepstone & Stone.*

P. B. H.

IN RE HARRISON. EX PARTE THE SHERIFF OF ESSEX.

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April 17.

Bankruptcy — Receiving Order — Sheriff — Execution—Interpleader—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 1—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 118, 119.

By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 1, "Where any goods of a debtor are taken in execution, and, before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."

Held, that under the sub-section, though interpleader proceedings are pending when notice of a receiving order is served on the sheriff, he is bound, on being so served, to deliver the goods or their proceeds to the official receiver, and is not entitled, as against the official receiver or the trustee in bankruptcy, to costs for any time for which he may remain in possession after he has been so served.

APPEAL from a decision of the judge of the Chelmsford County Court, affirming an order of the registrar, disallowing a claim for

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possession money in a bill of costs brought in for taxation by the sheriff of Essex, pursuant to s. 11, sub-s. 1 of the Bankruptcy Act, 1890, and rules 118 and 119 of the Bankruptcy Rules, 1886 and 1890.

The goods of the debtor, which were the subject of the bill of costs, after being taken in execution, were claimed under a bill of sale, and on September 14, 1892, an interpleader order was made directing the sheriff to sell them. On September 16, the official receiver gave the sheriff notice that a receiving order had been made against the debtor, and, on September 17, demanded the goods; but the sheriff refused to give him possession of them. The holder of the bill of sale afterwards withdrew his claim, the interpleader order was discharged, and the sheriff delivered the goods to the official receiver. The registrar disallowed possession money from September 17.

Wightman Wood, for the sheriff. The decision is erroneous. The sheriff is entitled under the sub-section (1) to his costs up to the discharge of the interpleader order. As long as that order subsisted, he was precluded from giving up possession of the goods.

[He referred to *Bird* v. *Matthews* (2) and *In re Levy, Ex parte The Sheriff of Essex.* (3)]

[VAUGHAN WILLIAMS, J. The sheriff might have applied for his costs in the interpleader proceedings under Order LVII., r. 15.]

Muir Mackenzie, for the trustee.

VAUGHAN WILLIAMS, J. I am of opinion that the learned county court judge was right. It is plain that the words in the

(1) By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 1, "Where any goods of a debtor are taken in execution, and, before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."

(2) 46 L. T. (N.S.) 512.

(3) 63 L. T. (N.S.) 291.

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sub-section, "the costs of the execution," mean the costs of the execution up to the time of the service on the sheriff of notice of a receiving order. The argument for the sheriff inserts after the words "the sheriff shall" the words "unless interpleader proceedings are pending," and a proviso that in that case the sheriff's costs up to the discharge of the interpleader order shall be included in "the costs of the execution." It is the duty of the sheriff, when served with notice of a receiving order, to hand over the goods or their proceeds to the official receiver. He is then entitled under the sub-section to the costs of the execution up to the date of such notice.

BRUCE, J. I am of the same opinion. It is clear that, under the sub-section, the sheriff is not entitled to costs for any time for which he remains in possession after notice of a receiving order. I also think that, after notice of a receiving order, it ceases to be his duty to remain in possession.

Appeal dismissed.

Solicitors: *W. P. Gepp, Chelmsford; Solicitor to the Board of Trade.*

H. D. W.

[IN THE COURT OF APPEAL.]

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May 5.

IN RE HANNAH LYNES. EX PARTE M. LESTER & CO.

Bankruptcy—Bankruptcy Notice—Married Woman trading separately—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1886, *r.* 136; *Appendix, Form No.* 6—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

A bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, cannot be issued against a married woman who is carrying on a trade separately from her husband, and against whom a creditor has recovered a judgment in the form settled by the Court of Appeal in *Scott* v. *Morley* (20 Q. B. D. 120).

APPEAL ex parte against the refusal of one of the bankruptcy registrars to issue a bankruptcy notice against Hannah Lynes, a married woman, who was carrying on a separate trade in the City of London.

The application for the issue of the notice was made by

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Lester & Co., who were judgment creditors of Hannah Lynes for a sum of 51*l.* 4*s.* 2*d.*, by virtue of a judgment in the form settled in *Scott* v. *Morley* (1), by which execution was limited to her separate estate not subject to any restraint on anticipation. The registrar refused to issue the notice on the ground that a married woman cannot owe a debt; that there cannot be a debt due from her, but only a debt due from her estate. The registrar referred to *Scott* v. *Morley* (1) and *In re Gardiner*. (2) He thought that the judgment of Cave, J., in the latter case precluded him from issuing the notice. Lester & Co. appealed ex parte.

Lynn, for the appellants. By s. 1, sub-s. 5 (3) of the Married Women's Property Act, 1882, a married woman who is carrying on a trade separately from her husband is, as regards her separate property, made subject to the whole law of bankruptcy just as if she were a feme sole. The registrar's decision in effect renders this provision nugatory; if he is right, a married woman who is trading separately can under no circumstances be made a bankrupt.

LORD ESHER, M.R. In my opinion, a bankruptcy notice cannot properly issue in this case. The person on whom it is proposed to serve the notice is a married woman, who is carrying on a trade separately from her husband in the City of London. It is true that such a person can be made a bankrupt; she may be made a bankrupt in some other way; but the question is whether a bankruptcy notice can be served upon her. A bankruptcy notice is issued under the provisions of s. 4 of the Bankruptcy Act, 1883, sub-s. 2 of which says that the notice "shall be in the prescribed form," which, by s. 168, means "prescribed by general rules," and the prescribed form of a bankruptcy notice is Form No. 6 in the Appendix to the Bank-

(1) 20 Q. B. D. 120.

(2) 20 Q. B. D. 249.

(3) Sect 1: "(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole."

By the Bankruptcy Act, 1883, s. 152: "Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882."

ruptcy Rules, 1886. The notice can be in no other form. The question is, whether such a notice can be served upon a married woman in order that she may be made a bankrupt. The notice can be issued only under sub-s. 1 (*g*) of s. 4 of the Act, which provides that a debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him, and has served on him a bankruptcy notice "requiring him to pay the judgment debt in accordance with the terms of the judgment," and the debtor fails to comply with the notice within the time limited for the purpose. The Form No. 6 does not follow the terms of a judgment against a married woman, and therefore no form of bankruptcy notice is given which does or can follow the terms of such a judgment. The judgment against a married woman is not a judgment against her personally; it is a judgment against her separate property. The bankruptcy notice says, "You must pay" to the creditor "the sum claimed by him as being the amount due on a final judgment obtained by him against you." A married woman is not bound personally to pay the judgment debt: it is only to be paid out of her separate property. Sect. 4, sub-s. 1 (*g*), and the Form No. 6 do not apply to such a case, and consequently a bankruptcy notice cannot be served upon a married woman. The registrar was quite right in refusing to issue the notice, and the appeal must be dismissed.

LOPES, L.J. I agree. A bankruptcy notice must follow the terms of the judgment in respect of which it is issued. A notice requiring a married woman to pay a judgment debt personally would not follow the terms of the judgment against her. This conclusion does not in any way conflict with the decision of this Court in *Pelton* v. *Harrison*. (1)

The present case is outside sub-s. 1 (*g*) of s. 4, and a married woman cannot be made a bankrupt under that sub-section. I am speaking only of sub-s. 1 (*g*). It is not true to say that the effect of our decision is to render the provisions of sub-s. 5 of s. 1 of the Married Women's Property Act, 1882, nugatory, for they would apply to the other acts of bankruptcy mentioned in s. 4 of the Bankruptcy Act, 1883.

(1) [1892] 1 Q. B. 118.

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A. L. SMITH, L.J. I think the registrar's decision was quite right. In *In re Howes* (1) we laid down that a bankruptcy notice must follow the terms of the judgment. Here the judgment is against the married woman's separate property, not against her personally, and yet the bankruptcy notice requires her to pay the debt personally. The notice is, therefore, not in accordance with the terms of the judgment, nor is it justified by s. 4, sub-s. 1 (*g*).

Appeal dismissed.

Solicitor: *J. G. Gibson.*

W. L. C.

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April 13, 14; *May* 6.

IN RE DAINTREY. EX PARTE HOLT.

Bankruptcy—Act of Bankruptcy—Notice of suspension of Payment of Debts—Notice "without Prejudice"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).

A written notice sent by a debtor to one of his creditors that he has suspended, or is about to suspend, payment of his debts, though expressed to be written "without prejudice," is admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition.

APPEAL from the refusal of the registrar of the Brighton County Court to make a receiving order.

The appellant, the petitioning creditor, presented a bankruptcy petition against the respondent, alleging as the act of bankruptcy that the respondent had given him notice that he had suspended, or was about to suspend, payment of his debts. The document relied on to prove that act of bankruptcy was a letter, dated December 24, 1892, sent by the respondent to the petitioning creditor, headed "without prejudice," in which the respondent offered to compound for the debt due from him to the petitioning creditor, and also stated that he was unable to pay his debts and would suspend payment unless the composition was accepted.

On December 15, 1892, the appellant had commenced an action against the respondent to recover a sum of money. The bankruptcy petition was presented on January 17, 1893. Judgment was signed in the action by the plaintiff on January 24.

Upon the hearing of the petition, the petitioner relied solely

(1) [1892] 2 Q. B. 628.

upon the notice which had been sent to him. The debtor objected that that letter, being written "without prejudice," was not admissible as evidence. The registrar decided that the letter was not admissible, and dismissed the petition for want of proof of the act of bankruptcy alleged.

The petitioning creditor appealed.

1893. April 13. *Muir Mackenzie*, for the appellant. The registrar was wrong in thinking that the letter written by the debtor was not evidence of an act of bankruptcy. The privilege which applies to letters written "without prejudice" between parties to an action or other legal proceeding has no application here. A debtor cannot evade the bankruptcy laws by stating, when he commits an act of bankruptcy, that he does it without prejudice.

F. C. Gore, for the respondent. The registrar's decision was right. The letter would clearly be inadmissible in evidence if it was attempted to be used in an action by the creditor against the debtor. The protection afforded to letters written without prejudice is not limited to letters written in proceedings in an action, or in some other pending legal proceedings. The rule is founded on the view that unnecessary litigation is an evil, and that the privilege ought to apply where one party makes statements in the course of negotiations in order to prevent the litigation going on. The same reasons apply here. The person making such statements is entitled to rely upon their not being used against him for any purpose, otherwise he would not make them. If the privilege applies, it applies for all purposes, whether inside or outside the particular proceeding. If not, the rule, which is founded on public policy, would not be effectual to carry out its own object. In *Ex parte Harris, Re Harris* (1), this point was not taken. The observations of Sir John Romilly, M.R., in *Hoghton* v. *Hoghton* (2), and in *Jones* v. *Foxall* (3) shew that the rule, having regard to the reasons for it, ought to receive a very wide application. In *In re River Steamer Company* (4) a letter written "without prejudice" was held not to

(1) 44 L. J. (Bank.) 33.
(2) 15 Beav. 278, at p. 321.
(3) 15 Beav. 388, at p. 396.
(4) Law Rep. 6 Ch. 822.

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take a case out of the Statute of Limitations; and in *Walker* v. *Wilsher* (1) the Court of Appeal held that letters written "without prejudice" ought not to be taken into consideration in determining whether there is good cause for depriving a successful party of costs. The general principle is stated by Tindal, C.J., and Coltman, J., in *Paddock* v. *Forrester*. (2) The privilege which exists between solicitor and client is analogous, and that privilege applies even against the Crown in criminal cases.

Muir Mackenzie, replied. It is the notice of suspension of payment contained in the letter which constitutes the act of bankruptcy, not the offer of a composition. The offer of a composition may be inadmissible as evidence, but the notice which is an act of bankruptcy cannot be made inadmissible by being headed "without prejudice." The authorities do not lay down the universal proposition that every letter written "without prejudice" cannot be used as evidence for any purpose. The rule is that offers of composition or settlement made during a dispute are, if made "without prejudice," inadmissible in evidence. If a statement is made which is an act of bankruptcy, the person making such a statement cannot prevent it from being an act of bankruptcy by saying that he makes the statement "without prejudice."

Cur. adv. vult.

May 6. The judgment of the Court (Vaughan Williams, and Bruce, JJ.) was read by

VAUGHAN WILLIAMS, J. In this case the question raised is as to the admissibility of a document which is expressed to be written "without prejudice." The question arose in this way:—A petition in bankruptcy was presented which alleged as an act of bankruptcy that the debtor had given notice to a creditor that he had suspended payment, or was about to do so. It was proposed to prove this act of bankruptcy by the production of the document in question; it was objected that the document could not be put in evidence, being written "without prejudice"; it was suggested, in answer to this objection, that the document in fact was a circular addressed by the debtor to his creditors,

(1) 23 Q. B. D. 335. (2) 3 Scott, N. R. 715, at p. 734.

and that a document of such a character would be admissible in evidence although headed "without prejudice"; to this it was replied that there was no evidence, dehors the document itself, that it was a document of such a character, or that it had been sent to any one beside the petitioner. The petitioner, by his counsel, in reply to a question by the learned registrar before whom the petition was being heard, deliberately elected to rely only on the sending of the circular to the petitioner, and offered no evidence of the notice having been sent to any other creditors. Under these circumstances it did not seem to us that we ought to allow further evidence to be put in on the appeal. We have, therefore, to decide the case on the materials before the learned registrar, who decided that the document was inadmissible, and dismissed the petition for want of proof of the act of bankruptcy alleged. In our opinion this decision was wrong. We think that the document was admissible in evidence. In the first place we think that the Court was entitled to look at the document and its contents for the purpose of deciding the question of its admissibility. It seems to us that the question of its admissibility depended upon a matter of fact, which matter of fact it was the function of the registrar, in his character of judge and not in his character as a juryman, to decide, and it seems to us that the judge, for this purpose, was entitled to look at the document, though not in evidence, just as he would have been entitled to have looked at the document if he had been trying a case before a jury before allowing it to be put in evidence before the jury. In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.

The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine

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whether the document does contain an offer of terms. Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character. The next question which arises is the question whether this document is of a character fulfilling the conditions to which the rule of exclusion applies. This is the document:—[The learned judge then read the letter.]

It seems to us that some of the conditions are complied with, but not all. There was a dispute, for there was an action pending between the parties. There was an offer, i.e., the offer of a composition, which was intended to apply, amongst other things, to the petitioner's claim in the action; but the document, the letter of the debtor to the petitioner, was, in our opinion, more than this: it was a clear act of bankruptcy, and it was notice to the petitioner of such act of bankruptcy, and it seems to us that a notice of an act of bankruptcy cannot be given "without prejudice" because the document in question was one which, from its character, might prejudicially affect the recipient whether or not he accepted the terms offered thereby. For the reasons already given we think that such a document does not fall within the rule which excludes offers for peace written without prejudice, and ought to have been admitted in evidence. If admitted, it conclusively proves the act of bankruptcy. It follows that the learned registrar ought to have made the receiving order on the petition, and we now make it and allow this appeal.

Appeal allowed.

Solicitors for appellant: *Senior, Attree, & Co., for Brydone, Petworth.*

Solicitors for respondent: *Daintreys.*

W. A.

MARTIN *v.* TOMKINSON. 1893 *May* 4.

Parliament—Election—Costs—Charges of Returning Officer—Parliamentary Elections (Returning Officers) Act 1875 (38 & 39 *Vict. c.* 84), *s.* 3, *sub-s.* 6, *s.* 4.

It is the duty of a returning officer, whose account has been taxed under s. 4 of the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), to return to each candidate, out of his deposit, a proportionate amount of any part of the account which has been disallowed, whether such candidate has or has not been a party to the taxation.

APPEAL of the plaintiff, one of the candidates at a parliamentary election for the Droitwich Division of Worcestershire, held in July, 1892, against a decision of a county court, dismissing an action brought by him to enforce the repayment by the defendant, as returning officer, out of the plaintiff's deposit, of half the amount of such of the defendant's charges as had been disallowed on taxation, under s. 4 of the Parliamentary Elections (Returning Officers) Act, 1875, at the instance of the other candidate. It appeared that, before the taxation took place, the plaintiff's election agent had, after examining the defendant's account, received from the defendant the difference between the plaintiff's deposit and half the sum which the defendant then claimed to retain as against the two candidates.

Bosanquet, Q.C. (*Hickey*, with him), for the plaintiff, relied on s. 3, sub-s. 6. (1)

(1) By the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), s. 3, sub-s. 6, where the returning officer requires security to be given for his charges, "the balance, if any, of a deposit, beyond the amount to which the returning officer is entitled in respect of any candidate, shall be repaid to the person or persons by whom the deposit was made."

By s. 4, "within twenty-one days after the day on which the return is made . . . the returning officer shall transmit to every candidate . . . or to his election agent . . . a detailed account, shewing the amounts of all the charges claimed by the returning officer in respect of the election, and the share thereof which he claims from the person to whom the account is transmitted . . . If the person, from whom payment is claimed, objects to any part of the claim, he may, at any time within fourteen days from the time when the amount is transmitted to him, apply to the Court as defined in this section for a taxation of the account; and the Court shall have jurisdiction to tax the account . . . and finally to

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Jelf, Q.C., and *Amphlett*, for the defendant, contended that the plaintiff could not avail himself of the results of the taxation, as he had not been a party to it.

THE COURT (Vaughan Williams and Bruce, JJ.) allowed the appeal.

Appeal allowed.

Solicitors for plaintiff: *Walker, Son & Co., for Collis, Stourbridge.*

Solicitors for defendant: *Greenfield & Cracknall, for Hughes & Brown, Worcester.*

H. D. W.

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March 27, 28.

[IN THE COURT OF APPEAL.]

IN RE PARSONS. EX PARTE FURBER.

Bill of Sale—Registration—Omission to renew Registration—Rectification of Omission—Extension of Time — Bankruptcy — Official Receiver — Vested Right—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 14.

After the time had expired for renewing under s. 11 of the Bills of Sale Act, 1878, the registration of a bill of sale, and before any application had been made under s. 14 to rectify the omission, the grantor of the bill of sale was adjudicated a bankrupt, and his estate vested in his trustee in bankruptcy :—

Held, affirming the judgment of the Queen's Bench Division, and following *Crew* v. *Cummings* (21 Q. B. D. 420), that the time for registration of the bill of sale could not be extended under s. 14, so as to defeat the vested rights of the trustee in bankruptcy.

In re Dobbins' Settlement (56 L. J. (Q.B.) 295) must be taken to be overruled by *Crew* v. *Cummings* (21 Q. B. D. 420).

APPEAL from an order of the Queen's Bench Division (Lord Coleridge, C.J., and Collins, J.), affirming an order of Bruce, J., in chambers, upon an application to extend the time for the renewal of the registration of a bill of sale, under the Bills of Sale Act, 1878. (1)

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determine the amount payable to the returning officer, and to give and enforce judgment for the same . . . The Court for the purposes of this Act shall be in the City of London the Lord Mayor's Court, and elsewhere in England the county court having jurisdiction at the place of nomination for the election to which the proceedings relate."

(1) The Bills of Sale Act, 1878, enacts, in s. 11, that "the registration of a bill of sale . . . . must be renewed once at least every five years,

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It appeared that the appellants were the assignees of the interest of the grantee under a bill of sale executed by one Parsons. In December, 1892, a period of five years had elapsed without the renewal of the registration of the bill of sale required by s. 11 of the Bills of Sale Act, 1878. In the same month Parsons was adjudged bankrupt under s. 121 of the Bankruptcy Act, 1883, the official receiver becoming trustee in the bankruptcy. On January 9, 1893, an application was made in chambers by the appellants, under s. 14 of the Bills of Sale Act, 1878, to extend the time for the registration of the bill of sale; but the learned judge, on the authority of *Crew* v. *Cummings* (1), refused the application.

T. Willes Chitty, (with him, Sir *Horace Davey*, *Q.C.*, and *H. Reed*, *Q.C.*), for the appellants. The object of the 14th section of the Bills of Sale Act, 1878, is to prevent bonâ fide bills of sale from being defeated by accidental omissions or misstatements, including the omission to renew the registration; and it gives the judge in general terms a discretion to rectify omissions of this description upon such terms as he may think fit. In the case of *In re Dobbins' Settlement* (2), by an error in the affidavit filed in accordance with s. 11 upon the renewed registration in October 1886 of a bill of sale, the registration became void. This was not discovered till February, 1887, and, although the grantor of the bill of sale had meanwhile become bankrupt in November, 1886, Grantham, J., held, in February, 1887, that the parties ought to be put back in the same position they would have occupied in October, 1886, if no mistake had been made, and the learned judge rectified the register; and Huddleston, B.,

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and if a period of five years elapses from the registration or renewed registration of a bill of sale, without a renewal or further renewal (as the case may be), the registration shall become void"; and s. 14 of the same Act provides that "any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale, or an affidavit of renewal thereof, within the time prescribed by this Act . . . . was accidental or due to inadvertence, may in his discretion order such omission . . . . to be rectified . . . by extending the time for such registration on such terms and conditions (if any) . . . . as he thinks fit to direct."

(1) 21 Q. B. D. 420.

(2) 56 L. J. (Q.B.) 295.

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and A. L. Smith, J., approved of this decision, and held that s. 14 conferred full power upon the judge in his discretion both to grant leave to renew the registration and to rectify the error. In *Crew* v. *Cummings* (1), the case of *In re Dobbins' Settlement* (2) was cited only from the *Times* Law Reports, sub-nom. *In the Matter of the Bills of Sale Act* (3); but that was the case of an assignee for value, which is distinguishable from the case of a trustee in bankruptcy; and it only decides that where some act has been done which ought to estop the grantee of the bill of sale, the omission ought not to be rectified. But so far as *Crew* v. *Cummings* (1) is in conflict with *In re Dobbins' Settlement* (2), the view taken by the judges who decided *In re Dobbins' Settlement* (2) is the true one, and, as the power of the judge under the 14th section is discretionary, the Court is not in any way bound by the decision in *Crew* v. *Cummings* (1).

Dickens, Q.C., and *Muir Mackenzie*, for the official receiver, were not called upon.

LINDLEY, L.J. I think there is no difficulty about this case. The cardinal point is that the grantor of the bill of sale was adjudicated bankrupt before any steps were taken to rectify this blunder. By virtue of the order made, the estate of the grantor vested in the official receiver as the trustee in the bankruptcy. There was a divesting of the grantor's property—that is the all-important thing—before January 9, 1893, when the application to renew the registration was made. The application was made under s. 14 of the Bills of Sale Act, 1878. Sect. 11 of that Act requires registration to be renewed every five years, and enacts that in default the registration shall become void. Then comes s. 14, which is important. [The Lord Justice read the section, and continued:—] That language is, in terms, as wide as language can possibly be. There have been certain decisions upon that section. In *Askew* v. *Lewis* (4), it was held that a bill of sale void for want of renewal of registration at the commencement of the Act of 1878 is not within s. 14, wide as its terms are. There have been two other decisions which are important.

(1) 21 Q. B. D. 420.
(2) 56 L. J. (Q.B.) 295.
(3) 3 T. L. R. 539.
(4) 10 Q. B. D. 477.

One is *In re Dobbins' Settlement* (1), where the Divisional Court did rectify a blunder, even although, before the application to rectify the register was made, the trustee in bankruptcy, or a creditor, had put in an execution, and had seized the goods, and had thereby acquired an interest in them. The other and later case was *Crew* v. *Cummings* (2), in which it was held by the Court of Appeal that, notwithstanding the general language of s. 14, which I have read, it was not right, even if it was in the discretion of the judge, to rectify the blunder which he was asked to rectify, after some third person had acquired a vested interest in the property forming the subject-matter of the bill of sale. We feel ourselves bound by the decision in *Crew* v. *Cummings* (2), and as the property in the chattels comprised in this bill of sale had been altogether divested from the grantor, and had vested in his trustee in bankruptcy, we must hold that it is too late to make the application. This was the view taken by the judge in chambers, and by the Divisional Court. This appeal must be dismissed with costs.

KAY, L.J. I am of the same opinion.

This application was made on January 9, 1893, and it appears that before it was made the estate of the grantor of this bill of sale had actually vested in the official receiver in his bankruptcy. An order had been made for summary administration before January 9; and thereupon, under the provisions of the Bankruptcy Act, the estate vested in the official receiver, if, as is the case here, there was no trustee appointed. So that before the application was made to rectify the register it is quite plain that the estate had been divested from the grantor of the bill of sale, and had vested in the official receiver in bankruptcy. Now, by the terms of the Bills of Sale Act, 1878, upon the failure to re-register this bill of sale the registration became void; and therefore this bill of sale did not interfere in the least degree with vesting the property in the official receiver in bankruptcy, and I hold myself completely bound by the decision in *Crew* v. *Cummings*. (2) In *Crew* v. *Cummings* (2) the facts were that the goods comprised in the bill of sale

(1) 56 L. J. (Q.B.) 295. (2) 21 Q. B. D. 420.

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had been taken in execution by an execution creditor; but they were claimed under the bill of sale as against him. The goods had been actually taken in execution, and the property in them had completely vested in the execution creditor, and had been divested from the grantor of the bill of sale. The rights of the execution creditor seem to me to be neither more nor less than the rights of the trustee in bankruptcy. Ordinarily, no doubt, he takes subject to all equities and subject to every right which can be asserted against the bankrupt himself. He stands simply in the shoes of the bankrupt; but for this purpose it was held in *Crew* v. *Cummings* (1) that, where the property had actually vested in the execution creditor, and been divested out of the grantor, before the time when the application for an extension of time to re-register the bill of sale was made, the Court either had no power to make such an order, or, if it had the power, then in the exercise of its discretion it ought not to make the order. That case seems to have been very elaborately and deliberately considered, because, if the dates given in the report are correct, the appeal was heard on April 10, 1888, and judgment was not given until August 9, 1888, when it was delivered by Bowen, L.J., the Master of the Rolls concurring. Now, I confess I feel myself bound by that decision. Even on the lower ground, supposing there was jurisdiction to extend the time, the Court of Appeal held that where a title had vested in the execution creditor in the meantime, the Court ought not, in the exercise of its discretion, to allow an extension of time for the re-registration of the bill of sale.

I quite agree that the decision of any Court on a matter of discretion is not absolutely binding on any other Court; but still this Court would not depart from the decision of the Court of Appeal upon a question of that kind, unless there could be some difference shewn between the facts of that case and the facts of this. Now, I have most carefully attended to all the facts of this case, and I confess that I can see no difference whatever. The real reason of that decision was that the rights of other persons had arisen; in that case, that the rights of the execution creditor

(1) 21 Q. B. D. 420.

had arisen. In this case rights have been obtained by the general creditors of the bankrupt by reason of the divesting of the estate from the grantor of the bill of sale, and the vesting of the estate in somebody else. I confess I think the reasons of that case apply entirely to this case; and even if we had jurisdiction under the Act it seems to me that that authority shews plainly that, under such circumstances, even if the Court has such a discretion, it should not be exercised to enlarge the time for re-registering the bill of sale. I therefore think the appeal fails.

A. L. SMITH, L.J. I am clear that *Crew* v. *Cummings* (1) overrules the case of *In re Dobbins' Settlement* (2), in which I and my brother Huddleston took part. I am also clear that *Crew* v. *Cummings* (1) binds me. I do not wish to say anything more, except that the Court below followed *Crew* v. *Cummings* (1), and, as the law stands, they were quite right in doing so.

This appeal must be dismissed.

Appeal dismissed.

Solicitors: *Richard Furber; Sole, Turner, & Knight, for W. C. Cripps & Son, Tunbridge Wells.*

(1) 21 Q. B. D. 420. (2) 56 L. J. (Q.B.) 295.

W. W. K.

1893
Jan. 17;
May 19.

THE NEWBOLD FRIENDLY SOCIETY, APPELLANTS; BARLOW, RESPONDENT.

Friendly Society—Industrial Assurance Company—Offences—Assurance on Life—Payments on Death of Children under Ten—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *s.* 2—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *ss.* 4, 28—*Definitions—Construction.*

Sect. 28 of the Friendly Societies Act, 1875, sub-s. 2, provides that no society shall pay any sum on the death of a child under ten except to the child's parent, or to the parent's personal representative, and upon the production, by such parent or personal representative, of a certificate of death issued by the registrar of deaths. By sub-s. 7 the word "society" in s. 28 "shall include all industrial assurance companies assuring the payment of money on the death" of children under ten. By s. 4, if not inconsistent with the context, the term "industrial assurance company" means "any company as defined by the Life Assurance Companies Act, 1870, which grants assurances on any one life for a less sum than 20*l.*, and which receives premiums or contributions, by means of collectors, at less periodical intervals than two months." By s. 2 of the Life Assurance Companies Act, 1870, "the term 'company' means any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life, or who grant annuities upon human life, within the United Kingdom."

The appellants were a society registered as a company under the Companies Acts, but not registered under the Friendly Societies Acts. Under the memorandum and articles of association members who paid subscriptions fortnightly to the collectors of the society were entitled to receive certain sick pay and sums for funeral expenses incurred on the death of their children, and a subscription card was issued to each member on which the collectors entered the contributions received from time to time. The appellants, having paid 5*l.* to a member on the death of her child under ten without the production by her of a certificate of death issued by the registrar of deaths, were summarily convicted of an offence against s. 28 of the Friendly Societies Act, 1875:—

Held, that the appellants were not within the definition of "company" in s. 2 of the Life Assurance Companies Act, 1870, as being persons "who issue or are liable under policies of assurance upon human life," but that those words should be rejected as inconsistent with the context, and therefore that the appellants were a society within s. 28, sub-s. 2, of the Friendly Societies Act, 1875, and rightly convicted.

CASE stated by justices of the peace of the county borough of Rochdale, under the Summary Jurisdiction Act, 1879.

The appellants were summoned to appear before the justices upon an information preferred by the respondent, on behalf of

the Chief Registrar of Friendly Societies, for that the appellants had unlawfully committed a breach of s. 28, sub-s. 2, of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), by paying a sum of money on the death of a child, under ten years of age, named John James Kay, to Alice Kay, the parent of such child, without the production by her of a certificate of death issued by the registrar of deaths containing the particulars required by the said section.

The following material facts were stated in the case:—

The registry of the appellants under the Friendly Societies Act, 1875, was cancelled by the Chief Registrar of Friendly Societies in 1885 (1), and the appellants subsequently carried on their business as an unregistered society, and were afterwards, and still continued to be, registered as a company under the Companies Acts, 1862 to 1890.

The objects for which the company was established were thus described in the appellants' memorandum of association: "The objects for which the company is established are to take over and carry on the business of the Friendly Society, held at the Fox Inn, Hyde Park Terrace, Milnrow Road, Rochdale, commonly called the "Newbold Friendly Society," and to provide by subscriptions, with or without the aid of donations, for the relief or maintenance of members of the society during sickness or other infirmity, not being mental, and for insuring money to be paid for the funeral expenses of members, and for all other purposes incident to the carrying into effect the above-named objects; and it is hereby declared that the society does not intend, nor shall it be empowered to issue policies of assurance on human life, or grant annuities on human life, within the meaning of the Life Assurance Companies Act, 1870."

The statement of the objects of the company was repeated in art. 2 of the articles of association. By art. 3: "Every person shall be deemed to have agreed to become a member of the

(1) By s. 24, sub-s. 4, of the Friendly Societies Act, 1875, "a society may by special resolution determine to convert itself into a company under the Companies Acts," and by sub-s. 8, "if a society be registered as . . . a company the registry of such society under this Act thereupon becomes void, and the same shall be cancelled by the chief registrar."

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society whose name shall have been entered in the books of the society, and who shall have paid the entrance fee to be fixed from time to time by the society. Art. 36 provided for the appointment of collectors. By art. 48: "Any person desirous of becoming a member of the society shall give notice to the collector for the district in which he resides. Inquiry shall then be made as to the state of the health of the proposed member. After the lapse of two weeks, and in case such inquiries are satisfactory, such person may, by the direction of the committee of management, be entered upon the books of the society as a member, and such entry shall be conclusive evidence for all the purposes of such membership."

By art. 50, every member of the society shall pay an entrance fee and fortnightly subscriptions, and shall be entitled to sick pay and to funeral gifts, according to a scale set forth in the article. It appeared from the scale that money for funeral expenses might be paid in respect of the death of children between the ages of three and thirteen, and that less sums than 20*l.* might be paid in respect of the death of one such child.

By art. 61: "The society shall issue to each member a subscription card, on which the collectors shall enter the contributions received from time to time. Such entries shall correspond with the entries in the collectors' books. If there are any arrears on any card when filled up such arrears shall be carried forward and entered in on a new card to be delivered to the member."

By art. 71: "In the event of the death of any member, immediate notice shall be given to the collectors of the district, who shall receive a certificate of the death from the parents or guardians of the deceased member, and forward the same to the president. The president or secretary, or the committee of management, may, at their discretion, dispense with any such certificate."

One of the society's subscription or collecting cards was annexed to the case. It was headed with the name of the society, and the place at which it was held; and then followed certain dates, with spaces opposite to them, in which the member's contributions and arrears were to be entered. Alice Kay was a member of the society, and had paid contributions to the

society, and in respect thereof had been entitled to the sum of 5*l.*, in the event of the death of her son John James Kay, for funeral expenses. John James Kay died on April 20, 1892, aged six years, and on April 21, 1892, the sum of 5*l.*, being the amount of the funeral expenses insured to Alice Kay upon the death of John James Kay, was paid to her by a collector on behalf of the appellants without the production of any certificate of death, but in other respects in accordance with the provisions of the articles of association.

The justices convicted the appellants, and imposed upon them a penalty, with costs.

The question for the opinion of the Court was whether the appellant society was a society as defined in s. 28 of the Friendly Societies Act, 1875, sub-s. 7, and subject to sub-s. 2. (1) If the opinion of the Court should be in the affirmative, the conviction to stand; but, if the Court should be of the contrary opinion, then the conviction to be quashed.

(1) By s. 28 of the Friendly Societies Act, 1875: "With respect to payments on the death of children under ten years of age, the following provisions shall have effect:—

"(2.) No society shall pay any sum on the death of a child under ten years of age except to the parent of such child, or to the personal representative of such parent, and upon the production by such parent, or his personal representative, of a certificate of death issued by the registrar of deaths, or other person having the care of the register of deaths, containing the particulars after mentioned."

"(6.) It shall be an offence under this Act—(*a*) If any society pays money on the death of a child under ten years of age otherwise than is provided by this Act."

"(7.) The word 'society' in the present section shall include all industrial assurance companies assuring the payment of money on the death of children under the age of ten years."

By s. 4: "In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them: . . . . 'industrial assurance company' means any company, as defined by the Life Assurance Companies Act, 1870, which grants assurances on any one life for a less sum than 20*l.*, and which receives premiums or contributions in Great Britain or Ireland, by means of collectors, at less periodical intervals than two months."

By s. 2 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61): "The term 'company' means any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life, within the United Kingdom."

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Arnold Herbert, (Pankhurst, with him), for the appellants. The conviction was wrong. The appellants are not one of the societies dealt with by s. 28 of the Friendly Societies Act, 1875, because they are not persons "who issue or are liable under policies of assurance upon human life" within the meaning of the definition of the word "company" in s. 2 of the Life Assurance Companies Act, 1870. They expressly declare in their memorandum of association that they do not intend, nor are they empowered, to issue such policies. The subscription card is not a policy of life assurance; it is issued merely to inform the subscriber how he stands with respect to his payments and arrears; it does not contain any contract of assurance, and it must be read with the memorandum and articles of association. A policy must be a written document containing the contract of insurance. A policy of insurance is defined in the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 117, as "Every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced."

The Attorney-General (Sir C. Russell, Q.C.), and *H. Sutton,* for the respondent. If such societies as this are not within s. 28 of the Friendly Societies Act they can insure the life of children without being subject to the safeguards provided—namely, that insurances can only be effected up to a certain amount according to the age of the child, and the registrar of deaths must certify the cause of death. The appellants' memorandum and articles of association shew that they are in reality a friendly society. The memorandum states one of the objects of the society to be, "for insuring money to be paid for the funeral expenses of members." That is neither more nor less than life insurance: a member receives a sum of money upon the death of another person. It is submitted that the subscription card, taken with the articles of association and the table of payments, constitutes a contract of life insurance. The card is evidence of the contract. The definition in the Stamp Act, 1870, which has been referred to, is not intended to be exhaustive; it says: "The term 'policy' includes every writing," &c.; but taking it as an exhaustive definition, this case is within it, because the card is that by which the contract "is evidenced." In *Foster* v. *Thackery,*

cited in *Good* v. *Elliott* (1), Lord Mansfield said that the word "policy" was derived from a French word which meant a promise, and he ridiculed the notion that a policy need be in any particular form. In the present case the appellants were persons who issued or were liable under policies of assurance upon human life, within s. 2 of the Life Assurance Companies Act, 1870. They were, therefore, a society which is covered by s. 28 of the Friendly Societies Act, 1875, and the conviction was right.

Arnold Herbert, replied.

Cur. adv. vult.

May 19. The following judgment of the Court (Lord Coleridge, C.J., and Cave, J.) was read by

CAVE, J. The question in this case is whether the appellants were liable to be convicted under the Friendly Societies Act, 1875, s. 28, sub-s. 2, which enacts: "No society shall pay any sum on the death of a child under ten years of age except to the parent of such child, or to the personal representative of such parent, and upon the production by such parent, or his personal representative, of a certificate of death issued by the registrar of deaths, or other person having the care of the register of deaths, containing the particulars after mentioned." The appellants were admittedly guilty of the offence if they were a society within the meaning of the section. As to that, sub-s. 7 enacts that, "the word 'society' in the present section shall include all industrial assurance companies assuring the payment of money on the death of children under the age of ten years." Sect. 4 of the same Act enacts that, "if not inconsistent with the context, ... 'industrial insurance company' means any company as defined by the Life Assurance Companies Act, 1870, which grants assurances on any one life for a less sum than twenty pounds, and which receives premiums or contributions in Great Britain or Ireland, by means of collectors, at less periodical intervals than two months." The Life Assurance Companies Act, 1870, by s. 2 enacts that "the term 'company' means any person or persons corporate or unincorporate, not being registered

(1) 3 T. R. 693, at p. 702.

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under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life, within the United Kingdom." Putting all these enactments together, sub-s. 2 of s. 28 of the Friendly Societies Act of 1875 will read as follows: "No society (which word includes, if not inconsistent with the context, any person or persons corporate or unincorporate not being registered under the Acts relating to Friendly Societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom, and who grant assurances on any one life for a less sum than 20*l*., and who receive premiums or contributions in Great Britain or Ireland, by means of collectors, at less periodical intervals than two months, and who assure the payment of money on the death of children under the age of ten years) shall pay any sum on the death of a child under ten years of age except to the parent of such child, or to the personal representative of such parent, and upon the production by such parent, or his personal representative, of a certificate of death issued by the registrar of deaths, or other person having the care of the register of deaths, containing the particulars after mentioned." It is contended for the appellants that they do not fall within this enactment on the ground that, although they come within the rest of the definition, they do not issue and are not liable under policies of assurance. Now we cannot perceive any ordinary sense of the words "policies of assurance" under which it can be said that the appellants issue such policies; and, if they do not issue such policies, we do not see how it can be said that they are liable under policies of assurance without using the words "policies of assurance" in two senses—one when they are read with the word "issue," and another when they are read with the words "liable under," which in our judgment is inadmissible. On the other hand, to hold that the appellants are not within s. 28, sub-s. 2, would be to deprive sub-s. 7 of all meaning, and that where it is most important that it should have a meaning. If such bodies as the appellants are not within the section, the lives of children under ten are deprived of the protection intended to be thrown

around them by the section in question. In our judgment the words "who issue or are liable under policies of assurance" are to be rejected altogether as inconsistent with the context, which sufficiently limits these companies by requiring that they shall be companies assuring the payment of sums of less than 20*l.* on the death of children under ten, the premiums on which are collected at less periodical intervals than two months. In our judgment the magistrates were right, and the appeal must be dismissed with costs.

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Judgment for the respondent.

Solicitors for appellants: *Woodcock, Ryland, & Parker, for Standring, Taylor & Co., Rochdale.*

Solicitor for respondent: *The Solicitor of the Treasury.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.

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May 12, 16.

FERRAND *v.* HALLAS LAND AND BUILDING COMPANY.

Local Government—Sewer—Sewer constructed by Landowner—Vesting in Local Sanitary Authority—Sewer constructed for Profit of Landowner—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 3.

By s. 13 of the Public Health Act, 1875, "all existing and future sewers within the district of a local authority . . . except (1.) sewers made by any person for his own profit, or by any company for the profit of the shareholders . . . shall vest in and be under the control of such local authority":—

Held, that a sewer made by a landowner for the sole purpose of draining houses erected by him on his own land is not made by him "for his own profit" within the meaning of the above exception, and that, consequently, such a sewer vests in the local authority.

APPEAL by the defendants against the judgment of Bruce, J., at the trial of the action, granting a perpetual injunction to restrain the defendants from permitting sewage to pass through certain drains from some cottages belonging to them into a stream called Cullingworth Beck, so as to cause that stream to flow to the plaintiff's land in a state less pure than that in which it flowed there previously to the discharge of sewage from the cottages by means of the drains into the stream.

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The plaintiff was the owner of land situate on both sides of the stream. The defendants were the owners of land near the stream, but situate higher up the stream than the plaintiff's land. The defendants erected on their land a row of sixty-nine cottages, and also on their own land they constructed a drain from each cottage, and a long intercepting drain or sewer with which each of the cottage drains was connected, the sewer being connected with the stream, so that the drainage from the cottages passed down the drains, through the sewer, and so into the stream. The drains and the sewer were, as the Court held on the evidence, constructed in pursuance of plans which were sanctioned by the local authority.

May 12. *Forbes, Q.C.*, and *C. M. Atkinson*, for the defendants. The defendants are not responsible for the long drain or sewer in question. The evidence shews that it was constructed by the defendants, with the sanction of the local authority, for the purpose of conveying the sewage of the cottages into the stream, and therefore the defendants are exempt from liability under s. 3 (1) of the Rivers Pollution Prevention Act, 1876.

(1) By the Public Health Act, 1875, s. 4, "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say (inter alia)—

"'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed:

"'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

By s. 13, "All existing and future sewers within the district of a local authority, together with all buildings, works, materials and things belonging thereto,

Except (inter alia)

"(1) Sewers made by any person for his own profit, or by any company for the profit of the shareholders;

shall vest in and be under the control of such local authority."

By the Rivers Pollution Prevention Act, 1876, s. 3: "Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried, into any stream any solid or liquid sewage matter, shall (subject as in this

Moreover, the long drain is a "sewer" within the definition contained in s. 4 of the Public Health Act, 1875, and therefore, by s. 13 of that Act it vests in the local authority, and is subject to their control, and the defendants have no control over it. If the plaintiff has any right of action, it is against the local authority, not against the defendants. The sewer was not made by the defendant company for the profit of their shareholders, and therefore it is not within the exception contained in s. 13 of the Public Health Act: *Bonella* v. *Twickenham Local Board of Health* (1); *Acton Local Board* v. *Batten* (2). Even if it increases the value of the houses, a sewer made by the owner for the sole purpose of draining his own houses is not a sewer made for the owner's profit within the meaning of the exception in s. 13. A sewer may be said to be made for the profit of the person who makes it if he allows other persons to use it on payment of a consideration, or if he conveys the sewage to a sewage farm, and there utilizes it and sells it. But a sewer the primary object of which is to get rid of the sewage from houses belonging to the maker of it is not made for his "profit."

Tindal Atkinson, Q.C., and *Kershaw*, for the plaintiff. There is no sufficient evidence that the long drain was made with the sanction of the local authority, and therefore the defendants are not exempted from the liability imposed by s. 3 of the Rivers Pollution Prevention Act, 1876.

The long drain, even if it is a "sewer" within s. 4 of the Public Health Act, 1875, did not vest in the local authority. It was made by the defendants for the "profit" of their shareholders. If a sewer is made for the purpose of carrying away the sewage from houses belonging to the person who makes it, it is made for his "profit." If he allows the sewage of houses belonging to other persons to flow into it, it ceases to be for his profit, and

Act mentioned) be deemed to have committed an offence against this Act. . . .

"A person other than a sanitary authority shall not be guilty of an offence under this section in respect of the passing of sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of any sanitary authority, provided he has the sanction of the sanitary authority for so doing."

(1) 18 Q. B. D. 577; 20 Q. B. D. 63.

(2) 28 Ch. D. 283.

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then it vests in the local authority. In *Bonella* v. *Twickenham Local Board of Health* (1), the plaintiff owned only some of the houses which drained into the sewer. No case has yet arisen in which all the houses which drained into the sewer belonged to the person who made it. *Acton Local Board* v. *Batten* (2) is also distinguishable from the present case. "Profit" is not necessarily a pecuniary profit. If the owner of houses sent the sewage from them to a sewage farm, and incurred a loss in so doing, would the sewer vest in the local authority? "Profit" must include the benefit which the owner of houses derives from a sewer which he has made for the purpose of draining them.

Forbes, Q.C., in reply.

Cur. adv. vult.

May 16. LORD ESHER, M.R. In my opinion the appeal should be allowed. The evidence shews that the local authority approved of the system of draining the cottages which was constructed by the defendants upon their own land.

Then arises the question, What is the result of that approval? That depends upon the Public Health Act, 1875. Now, first of all, we must see whether the two kinds of drain which the defendants have made are within the meaning of the statute. The drains which go from each of the cottages are clearly "drains" within the definition given in s. 4 of the Act. That section says that "'Drain' means any drain of and used for the drainage of one building only, and made merely for the purpose of communicating therefrom," with (among other things) a sewer. If these drains were made to communicate with the long drain, and if, on the true construction of the statute, that long drain is a "sewer," each of the small drains is a "drain." Then "'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies." The long drain is clearly not one to which the definition "drain" applies, because "drain" means a drain used for the drainage of one building only. This long drain carries the sewage from a number of buildings by means of a junction with the drains from each house. Therefore it is a "sewer" within

(1) 18 Q. B. D. 577; 20 Q. B. D. 63. (2) 28 Ch. D. 283.

the meaning of the Act, and the short "drains" are connected with the long "sewer."

What then is the effect of this state of things? Sect. 13 of the Act provides that "All existing and future sewers" (that will include the long drain of the defendants) "within the district of a local authority" (with an exception which I will mention presently) "shall vest in and be under the control of such local authority." Then there is this exception, "except sewers made by any person for his own profit, or by any company for the profit of the shareholders." The question of law, therefore, is, whether this sewer of the defendants is within that exception, as having been made by the defendant company for the profit of their shareholders. Now, the sewer was made by the company for the purpose of draining the cottages, and for no other purpose. Is such a sewer "made by the company for the profit of the shareholders"? It is said that it is, because it improves the value of the cottages for the shareholders. If the company wanted to sell the cottages, they could sell them for more money; if they wanted to let the cottages, they could let them for a higher rent than cottages which were not drained. Both these assertions may be open to some doubt. If in the neighbourhood of the cottages there are great works, and large numbers of workmen, it may well be that the drainage or non-drainage of the cottages would make but little difference to them. Cottages they must have; they must have some place where they can sleep. But assume that by reason of the sewer the cottages would let for more, or that, if sold, they would sell for more, is that mere fact the "profit" intended by s. 13? If it is, every house which drains into a sewer is in that predicament. If you once assume that a house which is drained into a sewer will fetch a higher rent or a higher price than one which is not so drained, and that therefore the sewer is made for the "profit" of the owner of the house, it follows that every such a sewer is within the exception and is beyond the control of the local authority. Then in every such case all that the local authority could do would be to say to the owner of the house, "You have made a perfectly good sewer which drains your house as well as it can be drained, but nevertheless it is not under our control.

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We have power to require your house to be drained to our satisfaction, and therefore we must require another drain to be made alongside your drain, precisely like it and connected in the same way, and if you do not build it we must do so, and charge you with the cost of it." In my opinion this construction would reduce the Act to mere nonsensical oppression, and for that reason it seems to me that it cannot be the true construction. We must therefore hold that, when a sewer draining several houses has been constructed for that purpose only by the owner of the houses with the approval of the local authority, that sewer is not within the exception in s. 13. And, if it is not within the exception, it is within the enacting part of the section, and it is vested in and is under the control of the local authority.

What is the result of that in the present case? The moment that the sewage has gone through the drain into the sewer the property in it is taken out of the landowner who made the sewer, and is vested in the local authority, and the landowner has lost all control over it. He cannot stop it from flowing into the stream; he cannot divert it and take it out of the stream. He has nothing more to do with it. That being so, how can it be within the bounds of reason to enjoin him not to do that which he cannot help doing? He would have no right to do that which the Court would be ordering him to do. The defendants would be trespassers or wrongdoers as against the local authority if they attempted to do that which the Court would be telling them to do. How can it be within the bounds of reason for the Court to issue an injunction against people in the position of the defendants under such circumstances? It seems to me that it would be highly improper to do so, and when once the facts were ascertained I think the learned judge ought as a matter of law to have said that, applying s. 13 to that state of things, it was impossible for him to grant the injunction.

The question of damages is not raised, and this appeal must be allowed.

LOPES, L.J., read the following judgment. It is admitted that the injunction granted in this case is right, if the plaintiff has any cause of action against the defendants. But it is said

that the defendants are not liable. The plaintiff is the owner of land on both sides of the Cullingworth Beck. The defendants have erected sixty-nine cottages on land of theirs near the Beck, and have constructed drains for the cottages in such a manner as to carry the sewage from the cottages into the Beck, whereby the water of the Beck is polluted, and the plaintiff as riparian owner is injured.

So far a strong primâ facie case is made against the defendants, both at common law and under s. 3 of the Rivers Pollution Prevention Act, 1876.

The defendants, however, relied on the last paragraph of that section, which exempts from the operation of the section a person who has the sanction of the sanitary authority for passing sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of the sanitary authority.

The defendants said that the sewage matter complained of passed along a drain communicating with a sewer belonging to and under the control of the sanitary authority of the district, and that they had the sanction of that authority for its so doing. I think this was made out. The defendants' plans had been approved by the sanitary authority. Those plans clearly indicated the nature and direction of the drainage, and I doubt not that all that was done was done under the supervision and with the knowledge of the surveyor of the local authority, and the sewage passed along a drain used for the drainage of more than one building, which was, therefore, within the definition of "sewer" contained in s. 4 of the Public Health Act, 1875. The plaintiff contended that the sewer in question was made by the defendant company for their own profit, or for the profit of their shareholders, within the meaning of s. 13 of that Act. This is the material question in the case. I am of opinion that the sewer was not made by the company for their own profit, or for the profit of their shareholders. A sewer made for "profit" means, in my opinion, not a sewer made for the mere purpose of drainage, not a sewer made for the mere purpose of discharging matter not to be in any way utilized, but which it was essential to get rid of for sanitary purposes, but a sewer made for the purpose of realizing a profit, above and beyond, and independently

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of, any sanitary purpose. Such, for instance, as a sewer made to collect feculent matter with a view of utilizing it for manure, or a sewer made for the purpose of carrying away surface or other water, and using it for irrigation. It was said that all drainage to buildings is made for a profit, because the value of the buildings is enhanced thereby. Such a construction would make it almost impossible for any sewer to vest in the local authority, because all buildings would have, as a necessary incident of their existence, some drainage attached to them, and the exception in s. 13 of the Public Health Act, 1875, would be almost a nullity. More cases would fall within the exception than within the rule. I presume the legislature thought that all sewers dealing with mere drainage, and disposing of it for mere sanitary purposes, ought to vest in, and be under the control of, the sanitary authority, and to be maintained at the expense of the ratepayers; but directly a sewer was made for the profit of individuals or an individual, such a burden ought not to rest upon the ratepayers at large. The Public Health Act, 1875, is "An Act for Consolidating and Amending the Acts relating to Public Health in England," and has nothing to do with private enterprise. The same construction was put upon the words "sewer made for profit" by Kay, L.J., in *Acton Local Board* v. *Batten* (1), with which I entirely agree. It was also the view adopted by the Divisional Court in *Bonella* v. *Twickenham Local Board of Health* (2), their decision being subsequently affirmed by the Court of Appeal. (3) Lord Esher, M.R., said, at p. 66, "We are of opinion that that sewer" (a sewer made by the owners of a building estate for the drainage of their houses in a street) "did not come within the exception in s. 43 of the Public Health Act, 1848, or that in s. 13 of the present Act" (that is, the Public Health Act, 1875), "not being a sewer made by any person for his own profit, or any company for the profit of their shareholders." I am unable to distinguish that case from the present.

No injunction can in these circumstances go against the defendants. The appeal must be allowed.

(1) 28 Ch. D. 283. (2) 18 Q. B. D. 577.
(3) 20 Q. B. D. 63.

A. L. SMITH, L.J., read the following judgment. The plaintiff is a riparian owner on the Cullingworth Beck, and the defendants are a building society, who have recently built sixty-nine cottages for mill hands, together with a sewer which passes into the Beck. Into this sewer the defendants send the sewage from their cottages by means of house drains, from which it passes down the sewer into the Beck. The plaintiff seeks an injunction to restrain the defendants from sending their sewage into this sewer, and thence into the Beck. There was also a claim for nominal damages for the past; but this was not insisted upon. The defendants in answer allege that the sewer is not their property, that it is vested in the local authority by virtue of s. 13 of the Public Health Act, 1875, that by s. 21 of that Act they are entitled to drain their cottages into the sewer, and that s. 3 of the Rivers Pollution Prevention Act, 1876, does not apply to them, because they have the sanction of the local authority for doing what they have done, which distinguishes their case from *Kirkheaton District Local Board* v. *Ainley* (1), in which case the defendants had obtained no such sanction. It appears to me that, if the sewer be vested in the local authority, and the defendants have the sanction of that authority for doing what they have done, this action is not maintainable, for, if it were, every householder, whose house is drained into a sewer which is vested in and is under the control of a local authority, would be liable to be proceeded against for what that authority might do with the sewage which flowed out of the mouth of the sewer, although the householder was unable to direct how and in what way that sewage was to be dealt with. It is immaterial who originally constructed the sewer; when once the sewer has vested in the local authority they are the persons liable for any injury caused by the effluent from the sewer, and not the persons who drain into the sewer, as they are entitled to do by reason of the provisions of the Public Health Act, 1875.

Sect. 13 of the Act of 1875 enacts that "All existing and future sewers within the district of a local authority . . . . except (amongst other things) sewers made by any person for his own profit, or by any company for the profit of the share-

(1) [1892] 2 Q. B. 274.

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holders, shall vest in, and be under the control of, such local authority." Now, what is the meaning of this exception? It is not disputed that, but for the exception, this sewer would have vested in the local authority. The making of a sewer by a landowner whereby to drain his houses might well be said to be for his own use, or for his own benefit or advantage; but these are not the words: the words are, "a sewer made for his own profit."

It seems to me that the true meaning of these words is, "a sewer out of which profit can be made by the person making it," and that the fact that a house may become enhanced in value, by reason of its having a sewer, instead of a cesspool, into which to drain, is not the true reading of this exception. Huddleston, B., in *Bonella* v. *Twickenham Local Board of Health* (1), gave, by way of example of what he thought would be a sewer made by a person for his own profit, the case of a person making a sewer for the purpose of collecting and conveying sewage to his sewage farm, or for the purpose of collecting and conveying sewage to be converted into manure at some particular place. I will give another instance. It will be noticed that a sewer need not necessarily convey sewage matter in order to constitute it a sewer. It would be none the less a sewer within the Act of 1875 if it conveyed only rain or surface water. The draining off of rain or surface water, collected from different premises by different feeders into one main drain, would constitute that main drain a "sewer" within the meaning of the Act. In some manufacturing districts this is done, and the water so collected is passed on and distributed upon payment amongst different receivers. A sewer made for this purpose would, in my opinion, be within the exception.

It is, however, not necessary to speculate what would or would not be a "sewer made by a person for his own profit," for I am clearly of opinion that a sewer made merely for the purpose of draining premises and for no other purpose (as in the present case) is not "a sewer made for profit" within the meaning of the exception; first, because it does not come within the ordinary meaning of the terms used; and, secondly, because, as was pointed out by Kay, J., in *Acton Local Board* v. *Batten* (2),

(1) 18 Q. B. D. at p. 582. (2) 28 Ch. D. 283.

and by Fry, L.J., in *Bonella* v. *Twickenham Local Board of Health* (1), if it did "the exception would almost eat up the rule." Lord Esher, M.R., in the latter case held, that a sewer made for the purpose of draining houses in a street was not within the exception, and in this I agree. That case, I should remark, was not cited to my brother Bruce, though *Acton Local Board* v. *Batten* (2) was cited to him, and an attempt was made to distinguish it.

In my judgment this sewer is not within the exception, and consequently it did vest in the local authority.

Upon the evidence I come to the conclusion that the local authority sanctioned the sewer which has been made by the defendants, and it is not true, as has been argued, that they did not know what the sewer was intended for when they sanctioned it. Sect. 3 of the Rivers Pollution Prevention Act does not, therefore, apply to the defendants.

The plaintiff has, in my opinion, sued the wrong defendants. In my judgment, for the reasons above stated, the appeal must be allowed, and judgment must be entered for the defendants, with costs here and below.

Appeal allowed.

Solicitors: *Brook, Freeman, & Batley; Wrenstead & Sharp.*

(1) 20 Q. B. D. at p. 65. (2) 28 Ch. D. 283.

W. L. C.

1893
June 8, 9.

THE QUEEN *v.* THE LORD MAYOR OF LONDON. Ex parte BOALER.

Justices—Practice—Dismissal of Information—Order against Complainant for Costs—Enforcement by Committal—Summary Jurisdiction Acts, 1848 *and* 1879 (11 *&* 12 *Vict. c.* 43, *s.* 22; 42 *&* 43 *Vict. c.* 49, *ss.* 35, 47).

Where an information is dismissed by justices, and an order for costs is made against the complainant, if no sufficient distress is found, and it is proved that the complainant has, or has had since the date of the order, means to pay, such order may be enforced by committal.

A RULE NISI had been granted for a certiorari to bring up and quash an order of commitment made under the following circumstances. (1)

(1) The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 22, after reciting that some statutes authorize justices to levy penalties by distress, but give no remedy in default of distress, provides that it shall in such cases "be lawful for the justice to whom such return is made, or to any other justice of the peace for the same county, riding, division, liberty, city, borough, or place, if he or they shall think fit, by his warrant as aforesaid, to commit the defendant to the house of correction or common gaol as aforesaid for any term not exceeding three calendar months, unless the sum or sums adjudged to be paid, and all costs and charges of the distress, and of the commitment and conveying of the defendant to prison (the amount thereof being ascertained and stated in such commitment), shall be sooner paid."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 47: "The provisions of this Act with respect to a sum adjudged to be paid by an order shall apply, so far as circumstances admit, to a sum in respect of which a court of summary jurisdiction can issue a warrant of distress without an information or complaint under the Summary Jurisdiction Act, 1848, in like manner as if the said sum were a civil debt; and the provisions of this Act with respect to the hearing, trying, determining, and adjudging of a case by a court of summary jurisdiction when sitting in open Court shall apply to the hearing, trying, determining, and adjudging by a court of summary jurisdiction of an application for the issue of any such warrant.

The provisions of this Act with respect to the period of imprisonment to be imposed in respect of the non-payment of a sum of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum, shall apply to the period of imprisonment to be imposed in respect of the non-payment of any sum of money adjudged to be paid by an order of a court of summary jurisdiction, or in respect of the default of a sufficient distress to satisfy any such sum,

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The applicant Boaler had preferred an information against the Northfleet White Lead Company for not keeping a register of members as required by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 25. The charge was heard before the Lord Mayor, who dismissed the information, and made an order that Boaler should pay 5*l.* 5*s.* costs. This sum was not paid, and in default of sufficient distress a judgment summons was taken out. Boaler had notice of the summons, but did not appear. At the hearing of the summons evidence was given of a statement by him that he had the money, but would not pay. Thereupon an order of commitment was made. The company was being wound up voluntarily. Before the date of the order of commitment the liquidators of the company had been removed, and no other liquidators were appointed until after the order of commitment had been made.

Poland, Q.C., and *Bodkin*, for the Lord Mayor, shewed cause. The order of commitment was properly issued. Costs ordered to be paid by an unsuccessful prosecutor are recoverable, not as a criminal liability, but as a civil debt, and therefore the provisions of the Summary Jurisdiction Acts for the enforcement of civil liabilities apply. The case is within s. 47 of the Summary Jurisdiction Act, 1879, and, proof of means having been given, as required by s. 35 of the same Act, it follows that the order was rightly made. Rule 21 of the rules made under s. 29 of that Act expressly provides that "a judgment summons may issue although no distress warrant has been applied for."

Courthope-Munroe, for the company and the liquidators.

Boaler, in person, was heard in support of the rule.

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where such sum is not a civil debt, nor enforceable as a civil debt."

By s. 35 of the same Act: "Any sum declared by this Act, or by any future Act, to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts," provided (inter alia) that an order for payment shall not, in default of distress or otherwise, be enforced by imprisonment, without proof of means, as in the case of an order under the Debtors Act, 1869.

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LAWRANCE, J. I am of opinion that the rule ought to be discharged.

The facts are these. The complainant Boaler preferred an information against a company for not keeping a register of members. The case was heard before the Lord Mayor, when the charge against the company was dismissed, and the complainant was ordered to pay costs amounting to the sum of 5*l.* 5*s.* He made default in payment, and no sufficient goods being found against which a warrant of distress could issue to satisfy the order for payment, an order was made for his committal. He now seeks to bring up and quash this latter order. The question is whether s. 47 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), applies to the present case. Sect. 22 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), provides for committal in default of distress, and the question is whether that is altered by s. 47 of the Act of 1879. In my opinion, all that was done here was perfectly regular, and I have no doubt that s. 47 of the Summary Jurisdiction Act, 1879, does apply. That section was specially passed to apply to a case of this kind, and was not passed to meet the case of a conviction, and therefore the present case is one in which an order for committal could properly be made.

WRIGHT, J. I am of the same opinion. The Acts draw a distinction between the case where an order is made against a person who is found guilty, and the case of an order made against a person who is not charged with any offence, as in the case of an unsuccessful prosecutor who is ordered to pay costs.

Another point which the applicant made was this. The company in question was in liquidation, and he says that the proceedings could not be continued. That affords no ground for granting a certiorari. It was a bad plea at common law that a compulsory winding-up was in progress. (1) The provision applicable to such a case is s. 87 of the Companies Act, 1862 (25 & 26 Vict. c. 89), by which, "When an order has been made for winding-up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company

(1) See *Gray* v. *Raper*, Law Rep. 1 C. P. 694.

except with the leave of the Court, and subject to such terms as the Court may impose." That section has always in practice been worked out by applying to stay the proceedings, and further it does not apply to the case of a voluntary liquidation, the provisions applicable to which are contained in s. 138, and under that section the stay is discretionary. A certiorari can only issue where there is a want of jurisdiction.

The third point was that the company's solicitors had no authority to act, because the liquidators who appointed them had been removed. But I apprehend that when a solicitor has been properly retained on behalf of a company in liquidation his retainer is not revoked by the removal of the particular liquidator who retained him. And whatever might have been the result if this point had been raised at the hearing, it is not a ground for certiorari.

Rule discharged.

Solicitor for the Lord Mayor: *H. H. Crawford, the City Solicitor.*

Solicitors for the Northfleet White Lead Company: *Hays, Schmettau, & Ancrum.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1893
June 19.

THE QUEEN *v.* THE JUSTICES OF OXFORDSHIRE.

Justices—Quarter Sessions—Appeal, Notice of—Service on Solicitor of Party—Duration of Solicitor's Authority—Affiliation Order—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 2.

Notice of appeal against an affiliation order was served upon the solicitor who had appeared for the mother on the hearing of the application for the order at petty sessions, and such service was accepted by him on her behalf:—

Held, that, his retainer as solicitor having come to an end upon the making of the order, he had no authority to accept service of the notice of appeal, and there was no valid service of such notice.

APPEAL from the order of a Divisional Court (Mathew and Wright, JJ.) discharging a rule nisi for a mandamus to the court of quarter sessions for the county of Oxford, to hear and determine an appeal against an affiliation order.

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The facts were as follows. A solicitor had been retained by the respondent in such appeal, the mother of the child, to appear for her at petty sessions in support of her application for an affiliation order against the appellant, the putative father. He accordingly appeared for her when the case came on for hearing before the justices in petty sessions at Banbury on March 9, 1893; and an affiliation order was made against the appellant, by which he was ordered to pay three shillings a week for the support of the child. The appellant afterwards instructed the solicitor who had appeared for him to appeal against the order. On Thursday March 16, the last day for giving notice of appeal, the appellant's solicitor called on the solicitor who had appeared for the respondent at his office and handed him a notice of appeal against the order. He accepted service of such notice on behalf of the respondent; and subsequently wrote a letter to the respondent, which reached her on the following day, informing her of the receipt of the notice, and stating that, if she wished counsel instructed to support the order at the sessions, she must come and see him on the following Monday. On that day she called upon him at his office and inquired what the probable expense to her of the appeal would be. He told her what, in his opinion, the cost would be; and she said that she had a friend in the town who would, she thought, find the money for her, and that she would call again in the course of the day to let him know whether she could find the necessary amount of money. She did not call again, but on the following day wrote to the effect that she was waiting to see if she would be able to carry the matter through, and would call on the following Monday. On that day she wrote to him that she would not require his services. It appeared that she had in the meantime arranged with another solicitor to act for her on the appeal. When the appeal came on for hearing at the Oxfordshire Quarter Sessions, the objection was taken on behalf of the respondent that no valid notice of appeal had been given to the respondent. The sessions were of opinion that that was so, and therefore refused to entertain the appeal.

Thereupon a rule nisi for a mandamus to them to hear and

determine the appeal was obtained by the appellant, which on argument was discharged by the Divisional Court.

Mackarness, for the appellant. The provisions with regard to notice of appeal against an order of a court of summary jurisdiction are to be found in the Summary Jurisdiction Act, 1879, s. 31, sub-s. 2. By that enactment, the appellant is within the prescribed time, or, if no time is prescribed, within seven days after the day on which the decision appealed against was given, to give notice of appeal by serving on the other party and on the clerk of the court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal. It is not necessary that there should be personal service on the party: *Ex parte Portingell* (1); it is submitted that it is sufficient if the notice is served under such circumstances, or upon a person having such a relation to the party, as that presumably it would come to such party's knowledge, and it does afterwards come to his knowledge: *Syred* v. *Carruthers*. (2) Here the notice was served on the solicitor who had appeared for the respondent in the proceedings, and who, it is contended, still continued to be the respondent's solicitor for the purposes of the litigation. Service of the notice was accepted by him as such solicitor on behalf of the respondent, and he did afterwards inform the respondent of it. He must be taken to have been retained to act as the respondent's solicitor for the purposes of the affiliation proceedings, and such proceedings could not be considered to be finally completed until the period had elapsed during which there might be a rehearing of the case at quarter sessions. At any rate, the respondent having put him forward as her solicitor in the proceedings, and having given the appellant no intimation that his authority was at an end, the appellant was entitled to consider him as still representing her in the matter. The cases of *Syred* v. *Carruthers* (2), and *Pennell* v. *Churchwardens of Uxbridge* (3), shew that the solicitor's authority in such a case presumably continues after the making of the order. [He also cited on this point, *Lady de la Pole* v. *Dick* (4),

(1) [1892] 1 Q. B. 15.
(2) E. B. & E. 469; 27 L. J. (M.C.) (N.S.) 273.
(3) 31 L. J. (M.C.) (N.S.) 92.
(4) 29 Ch. D. 351.

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Lawrence v. *Harrison* (1), and Order VII., r. 3.] Assuming that the solicitor's authority had determined, and that he was not the respondent's solicitor when the notice was served upon him, it is submitted that she afterwards ratified his acceptance of the service on her behalf by treating him as such. [He cited on this point, *Anderson* v. *Watson.* (2)]

Francis Fitzgerald, for the respondent, was not called upon.

LORD ESHER, M.R. The question in this case appears to be whether any notice of appeal can be said to have been served upon the respondent. The respondent obtained an affiliation order directing the payment of three shillings a week by the appellant. She had retained a solicitor for the purpose of obtaining that order, and it appears to me that, when it was obtained, the purpose for which he was retained was accomplished. The appellant afterwards made up his mind to appeal against the order, and instructed a solicitor for the purpose of such appeal. The first thing which he had to do was to give notice of appeal to the respondent. It was contended that, personal service not being necessary, there might be service on a person having such a relation to the respondent that service on such person would be equivalent to service on her. It does not seem to me to become material in this case to consider whether that is so. In this case the notice of appeal was served on the gentleman who had been the respondent's solicitor, and the contention for the appellant is that he still remained her solicitor. The first question, therefore, is whether that contention is correct. On what grounds can it be said that he remained her solicitor? There is no statutory provision to that effect. Is there any principle at common law upon which it can be said that he continued to be her solicitor? It has been held, no doubt, with regard to common law actions in which there has been a judgment, but such judgment has not been carried into effect by execution, that, so long as steps remain to be taken in the litigation for the purpose of obtaining for one party the fruits of it, or of defending the other party from any wrong proceeding by way of execution, the action is not finished; and there-

(1) Sty. 426. (2) 3 C. & P. 214.

fore the solicitor who was instructed by a party in the action remains his solicitor, unless his authority has been revoked, and notice of such revocation given to the other party. After the decision in *Lady de la Pole* v. *Dick* (1), it must be taken that the same principle applied to a litigation in the Court of Chancery, and that, where there was a decree or order in such a litigation, which required to be worked out in chambers, until it was so worked out the authority of the solicitor continued. I do not think that the Court of Appeal intended to lay down any new rule in that case; they merely came to the conclusion that in Courts of Equity the same rule had always existed on the subject as in the Courts of Common Law. But it appears to me that the Court expressly declined to lay it down as being the law that the authority of the solicitor would continue, or the other party would be entitled to treat it as continuing, as long as there might be an appeal. It was suggested in that case by Cotton, L.J., that it was very inconvenient that the authority of the solicitor should not continue as long as there is a right of appeal, and Bowen, L.J., said that it was very curious that the case had not been dealt with by general order. Order VII., r. 3, to which our attention has been called, appears to have been framed in consequence of that expression of opinion. That rule applies to a person suing or defending in the High Court; but of course it does not apply in the present case. Here a solicitor was employed by the respondent to obtain an affiliation order against the appellant, and, when that order was obtained, that litigation was finished, and nothing more remained to be done in it. It seems impossible to apply to such a case the doctrine applicable to common law actions, in which the fruits of the judgment have not been obtained by execution; for the result would be that the authority of the solicitor would continue for the whole period during which payments had to be made by the appellant in respect of the child. For these reasons I think we cannot hold that the authority of the solicitor continued, or that the appellant was entitled to assume that it continued, when the notice of appeal was served.

Then it has been suggested that the respondent ratified the

(1) 29 Ch. D. 351.

C. A. 1893

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Lord Esher, M.R.

acceptance of notice by him. I think it is impossible to say, having regard to the position of the parties and what took place, that there was any such ratification by her. It does not appear to me that it was ever brought to her knowledge by the solicitor that she had to consider the question whether she should ratify the service of the notice on him, as being her solicitor. What she did was to consider, not whether he was her solicitor, but whether he should be her solicitor in the appeal for the purpose of instructing counsel.

Under these circumstances, I am of opinion that there was no valid service of any notice of appeal on the respondent, and therefore this appeal must be dismissed.

BOWEN, L.J., and KAY, L.J., concurred.

Appeal dismissed.

Solicitor for the appellant: *Thomas A. Jones, for Stockton & Sons, Banbury.*

Solicitors for the respondent: *Cunliffe & Davenport, for Davenport & Rose, Oxford.*

E. L.

1893

June 7.

BOWYER *v.* THE PERCY SUPPER CLUB, LIMITED.

Licensing Acts—Proprietary Club—Selling intoxicating Liquors to Members without a Licence—6 *Geo.* 4, *c.* 81, *s.* 26; 4 *&* 5 *Wm.* 4, *c.* 85, *s.* 17; 23 *&* 24 *Vict. c.* 27, *s.* 19; 35 *&* 36 *Vict. c.* 94, *s.* 3.

The respondents, a registered company, were the proprietors of a club. The appellant applied to become a member of the club, and, having paid a subscription, was elected an honorary member pending inquiries, and was then supplied with beer, wine, and spirits, for which he paid. The respondents did not hold any licence for the sale of intoxicating liquors:—

Held, that the respondents might be convicted for selling beer, wine, and spirits without a licence.

CASE stated by a metropolitan police magistrate.

The appellant, an officer of Inland Revenue, summoned the respondent company for selling, on October 16, 1892, beer, wine, and spirits by retail without having such Excise licences, authorizing them so to do, as are required by statute. (1)

(1) 6 Geo. 4, c. 81, s. 26; 4 & 5 Wm. 4, c. 85, s. 17; 23 & 24 Vict. c. 27, s. 19; 35 & 36 Vict. c. 94, s. 3.

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It appeared that the respondents were an incorporated company registered under the Companies Acts, and that they were established to carry on and maintain a proprietary club for the accommodation of shareholders of the company and their friends. The club was under the management of a committee of members in whom the election of new members was vested. The annual subscription was two guineas, payable in advance, and each member might introduce a visitor. The club-house and furniture, and the drink and liquors at such club-house, were the property of the proprietary company and not of the members of the club, and all the profit from the sale of such drink and liquors and from the carrying on of the club belonged to the company. The company had not any excise licence for the sale of beer, wine, or spirits. On the day in question the appellant, who was not either a member of the club or a shareholder in the company, visited the club and asked for wine and spirits. The attendant inquired whether he was a member of the club, and, on being told that he was not, refused to supply him, and drew his attention to a notice posted up in the club rooms to the effect that visitors could under no circumstances be allowed to pay for refreshments. The appellant then offered to become a member of the club, and was supplied with a proposal form on which he wrote an assumed name and handed it to the secretary of the club, together with 2*l.* 2*s.* in cash as his subscription. He was told that inquiries would be made, and that if they were satisfactorily answered he would be elected a member of the club, and he was then supplied at his request with beer, wine, and spirits. Later in the evening he was told that he had been elected an honorary member of the club pending inquiries. Some days later he received a letter from the secretary of the club, informing him that he had not been elected a member of the club, and returning him the 2*l.* 2*s.* which he had paid.

On these facts the magistrate found that there had not been a sale of beer, wine, and spirits within the meaning of the Acts, and declined to convict.

Poland, Q.C., and *Danckwerts*, for the appellant. The magistrate was wrong. A proprietary club is not like a members'

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club, in which the property is in the members themselves. The proprietor must therefore have a licence to sell his beer, wines, and spirits. It makes no difference whether the proprietor of the club is an individual or a company, nor can it make any difference whether the proprietor is bound to sell his liquor only to members of the club. A distinction is drawn in all the cases between a members' club and a proprietary club: *Graff* v. *Evans* (1); *Newman* v. *Jones* (2); *Evans* v. *Hemingway* (3); *Baird* v. *Wells* (4); *Newell* v. *Hemingway* (5); *Stevens* v. *Wood.* (6)

Crump, Q.C., and *E. U. Bullen*, for the respondents. The magistrate was right. The intention of the Acts was to prevent the sale by retail without a licence at houses of public resort (35 & 36 Vict. c. 94, s. 3). No licence is requisite at clubs, whether they be members' clubs or proprietary clubs, for the sale of liquors to the members of such clubs. The appellant must be assumed to have been at the time the liquor was supplied to him a member of the club. The subscription which he had paid gave him a proportionate interest in all the property of the club, including the beer, wines, and spirits, and he had a right to be supplied with those commodities. [They referred to *Reg.* v. *Wilkinson* (7); *Lyttelton* v. *Blackburne.* (8)]

MATHEW, J. I think the findings of fact in this case should have led the learned magistrate to a different conclusion to that at which he arrived. It appears to be clear that a licence to sell by retail is necessary to anybody who sells by retail, and the sole question before the learned magistrate was whether the proprietors of this club, a limited company, did sell by retail. The constitution of this so-called club was that the members, upon election and the payment of a certain subscription, became entitled to the use of this house and to the accommodation which the house afforded, and were further entitled to enter into contracts for the purchase of wines and spirits with the proprietors

(1) 8 Q. B. D. 373.
(2) 17 Q. B. D. 132.
(3) 52 J. P. 134.
(4) 44 Ch. D. 661.
(5) 58 L. J. (M.C.) 46.
(6) 54 J. P. 742.
(7) 10 L. T. (N.S.) 370.
(8) 45 L. J. (Ch.) 219.

out of their stock. It is agreed on all hands that the stock of wines and spirits in this place belonged to the proprietary company. It is agreed further that the company was under no obligation to furnish the members of the club with any special wine or any particular spirits. The company supplied them as it thought proper out of its stock, and I am wholly unable to see any distinction in principle between this case and the case of a friendly society arranging with the landlord of a public-house that they should have the use of a room in the public-house on certain occasions, and be supplied by him with liquors. We must therefore send the case back to the learned magistrate with this intimation of our opinion.

WRIGHT, J. I am of the same opinion. Mr. Crump's argument rested on two points. His first point was that the restriction upon the sale of liquor applied only to places of public resort. I do not think that is so. The intention may be that only houses of public resort shall be licensed by the joint action of the justices and the Excise, but it does not follow that persons who do not keep houses of public resort can sell without a licence. The other point was that in some proprietary clubs, and presumably in this one, although the proprietor sells to the members, he is acting under a convenient arrangement by which the financial matters of the club are conducted by him, and therefore it is not a sale. I cannot follow that. I do not think we ought to be understood as laying down any rule applying to proprietary clubs generally; but upon the facts it appears clear that there was a sale here, and that there is nothing to take the case out of the Act.

Case remitted to magistrate.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondents: *R. Raphael.*

A. P. P. K.

1893
June 12.

THE QUEEN *v.* POWNALL AND OTHERS, JUSTICES OF THE COUNTY OF LONDON.

Licensing Acts—Beerhouse—Application for Certificate of Justices—Notice—Time, Computation of—Wine and Beerhouse Act, 1869 (32 & 33 *Vict.* c. 27), *s.* 7—*Licensing Act*, 1872 (35 & 36 *Vict.* c. 94), *ss.* 40, 43, 50.

By s. 7 of the Wine and Beerhouse Act, 1869, "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, &c."

Held, that the twenty-one days are to be computed, not from the first day of the general annual licensing meeting at which the application is made, but from the day upon which the application is actually heard.

MANDAMUS to justices to hear and determine an application for the confirmation of the grant of a licence to sell intoxicating liquors.

Prior to February 13, 1893, the justices acting for the Tower division of the county of London published a notice that they would hold a general annual licensing meeting in the said division on March 6, 1893, for granting and renewing licences for the sale of intoxicating liquors. At the end of such notice was appended a note to the effect that "New applications will not be taken before March 20."

On February 13, 1893, one Adelaide Watts served upon the superintendent of police of the district (1) notice in writing of her intention "to apply at the general annual licensing meeting to be holden in and for the Tower division of the county of London on the 6th day of March, 1893," for a licence to sell intoxicating liquors on premises known as the Bromley Hall Tavern, by way of removal of the licence held by one George Pegg for the sale of intoxicating liquors at a public-house known as the David and Harp.

On March 6, the justices issued a notice that they would continue their general annual licensing meeting by adjournment, and appointed March 20 for the hearing of applications for new licences of every description, including licences by way

(1) See s. 4 of the Wine and Beerhouse Act, 1869, Amendment Act, 1870 (33 & 34 Vict. c. 29).

of removal. It had been for forty years past the practice of the justices of the division in dealing with the business to be transacted by them at the general annual licensing meeting to take on the first day of the meeting applications for renewals of licences only, and not to take applications for new licences until fourteen days afterwards.

On March 20, the application of Adelaide Watts was heard and granted, no objection having been taken to the sufficiency of her notice. At the subsequent hearing of her application before the county licensing committee for the confirmation of her licence objection was taken that the twenty-one days' notice of intention to apply required by 32 & 33 Vict. c. 27, s. 7, and 35 & 36 Vict. c. 94, ss. 40, 50, was to be computed from the first day of the general annual licensing meeting, that there were not twenty-one clear days between February 13 and March 6, and that consequently her notice was insufficient. The committee upheld the objection and refused the confirmation. The justices of the county of London in quarter sessions assembled had made a number of standing orders relating to proceedings before the county licensing committee, purporting to act under the powers given by s. 43 of the Licensing Act, 1872. One of such standing orders was, that "In unopposed cases it shall not be necessary to prove that the notices required by the Licensing Acts have been duly given."

The applicant having obtained a rule nisi for a mandamus to the county licensing committee to hear and determine her application for confirmation,

Avory, for the objector, shewed cause. By s. 50 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), notice of intended application for a licence by way of removal is to be given "in the same manner as notice is given of an application for the grant of a new licence." By s. 40 of the same Act, "Every person intending to apply for a new licence . . . . shall cause notice thereof to be given in manner directed by s. 7 of the Wine and Beerhouse Act, 1869." And by s. 7 of the Wine and Beerhouse Act, 1869, "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at

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least before he applies, give notice in writing of his intention to one of the overseers of the parish," and also, by 33 & 34 Vict. c. 29, s. 4, to the superintendent of police of the district. It is clear upon the authorities that twenty-one days at least means twenty-one clear days. If therefore the period is to be computed from March 6, the notice is bad, being one day too short. But the period must be so computed from March 6, for although the application was not in fact heard till March 20, it must be treated as having been made on March 6, on the same principle as that on which all convictions and other matters taking place at quarter sessions are treated as taking place on the first day of the session. March 6 was the only date mentioned in the notice, and was the only date which could have been so mentioned, for on February 13 no other date for the taking of applications for new licences could by law have been fixed. It is true that in the justices' notice issued prior to February 13 it was stated that new licences would not be taken before March 20; but that statement was of no binding force, for by s. 3 of the Licensing Act, 1828 (9 Geo. 4, c. 61), the justices are to adjourn the general annual licensing meeting at the meeting itself, and not before. They had no power to fix March 20 as the date for taking new licences until March 6 had arrived. Nor could the practice of the division as to taking new licences fourteen days after the first day of the meeting be material, for it could not override the Act of Parliament. A notice cannot be good in one division which would be bad in another. The justices were not bound by their practice, and might at any moment have departed from it had they been so minded. If, then, the period of the notice is not to be computed from March 6, the notice is to be a notice for an indefinite date, and, if given less than twenty-one days before the general annual licensing meeting, will turn out to be a good notice or a bad one, according as the justices choose to fix the hearing of the application for one day or for another; whereas the sufficiency of a notice ought to be ascertainable at the date of the notice given. It is true that in *Drake's Case* (1) a notice of an intention to apply at an adjourned meeting was held sufficient; but there the justices at the general

(1) Law Rep. 5 Q. B. 33.

annual licensing meeting held on August 20 adjourned the meeting to September 17, and the applicant gave his notice on August 25 for September 17, so that his notice was for a definite date and was given after the adjourned meeting had been legally fixed. The case is therefore wholly distinguishable from the present.

If, then, the notice in the present case was a bad one, the objection to it was one which was properly taken before the county licensing committee. For the giving of a proper notice is a condition precedent to the jurisdiction of the licensing justices, and it cannot be that the committee are debarred from inquiring whether the licensing justices had jurisdiction to grant the licence which they, the committee, are asked to confirm. Moreover, the justices for the county of London, who by s. 43 of the Licensing Act, 1872, are empowered to make "rules as to the proceedings to be adopted for confirmation of new licences" have made a standing order with reference to proceedings before the county licensing committee to the effect that, "In unopposed cases it shall not be necessary to prove that the notices required by the Licensing Acts have been duly given." That imports that in opposed cases proof of the notices is necessary; and the committee are bound to enforce that standing order.

Poland, Q.C., and *Bodkin*, for the applicant, in support of the rule. The language of the Act is perfectly clear. The applicant is to give notice twenty-one days "before he applies." That can only refer to the date when his application is actually heard. Even if the Act had required the notice to be twenty-one days before the general annual licensing meeting, still the notice in the present case would have been good, for the Court would for this purpose understand the general annual licensing meeting to mean that adjournment of the meeting at which alone this particular class of applications could be heard. In *Reg.* v. *Justices of Anglesey* (1) it was held that a notice, which by s. 42 of the Licensing Act, 1872, was required to be given "not less than seven days before the commencement of the general annual licensing meeting," was sufficient if it was given not less than seven days before the adjourned licensing meeting for that part

(1) [1892] 1 Q. B. 850.

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of the division in which the premises were situate. The present is an à fortiori case. Secondly, even if the notice was bad, the objection to it was not one that the county licensing committee could entertain. The standing order that has been referred to does not say that proof of the notices is required in opposed cases. But, further, if it is to be read as meaning that, the order is ultrà vires. The authority to make rules given by s. 43 is limited to rules as to procedure; whereas such a rule as this would impose a new condition upon the acquisition of a licence beyond those imposed by the statute.

MATHEW, J. In this case I am of opinion that the mandamus must go. The county licensing committee decided that they had no jurisdiction to entertain the application by reason of the applicant having failed to give a proper notice of her intention to apply for a licence. It is agreed on all hands that, if the notice is to be calculated from the first day on which the licensing justices met, the notice was insufficient, being short of a day. The objection was not taken before the licensing justices, and they granted the licence. Then came the application to the county licensing committee, and upon the objection being taken before them they declined to entertain the application.

It seems to me that the committee did not sufficiently advert to the language of s. 7 of 32 & 33 Vict. c. 27, when they arrived at their decision. They construed the Act as if it contained a provision that the notice must be given twenty-one days before the first day of the general annual licensing meeting. But that is not the language of the Act, and one can see a very good reason why it should not be. It appears that in this division, as indeed is also the case in many large towns throughout the country, there is a practice for the justices to appoint, upon the first day upon which they meet, an adjourned meeting at which to take applications of this sort; and in the present case it appears from a notice issued by the licensing justices themselves that this application amongst others would not be heard before March 20. In my opinion, therefore, a notice given more than twenty-one days before March 20 was amply sufficient. The Act provides, that "Every person intending to apply to the justices

for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, &c." The words are, "before he applies." There seems to me to be no reasonable ground for construing them as meaning "before the general annual licensing meeting." So to construe them would be to alter the language of the Act of Parliament, which we have no power to do. We were pressed with the analogy of the rule of quarter sessions that everything which is done at the sessions is supposed to be done on the first day. But the reason of that rule seems to be that the court of quarter sessions is a court of record—a reason which has no application to a court of summary jurisdiction such as the general annual licensing meeting. The analogy therefore fails. Then it was said that the justices have hampered themselves by some standing order which the committee interpreted as obliging the notices to be proved before them wherever the application for confirmation is opposed. It is, however, unnecessary for us here to decide whether that order meant what they thought it did; nor is it necessary, if their interpretation was correct, to decide whether such order was intrà vires. It is enough to say that there is no ground on which the committee ought to have refused to hear the application.

WRIGHT, J. I am of the same opinion. I think that *Drake's Case* (1) is an authority binding upon us as regards the principle applicable to the case before us. It has been argued here that the application for a licence must be deemed to be made on the first day of the general annual licensing meeting; but *Drake's Case* (1) is a distinct authority to the contrary. It was there held that twenty-one days' notice before the adjourned meeting at which the application was in fact made was sufficient, the only difference between that case and the present being that there the day of the adjourned meeting was specified, and here the first day of the general meeting was specified. In all that my brother Mathew has said I entirely concur. Without positively expressing an opinion as to whether the county licensing committee have any jurisdiction to consider the sufficiency of the

(1) Law Rep. 5 Q. B. 33.

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notices, I think it right to say that in my judgment they probably have not.

Rule absolute.

Solicitors for applicant: *Clapham, Fitch, & Co.*
Solicitors for objector: *Maitland, Peckham & Co.*

J. F. C.

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May 2.

HENDERSON *v.* THORN.

Landlord and Tenant—Lease—Breach of Covenant to deliver up Premises in Repair—Measure of Damages.

A lessor brought an action against the lessee during the currency of the lease to recover damages for breaches of covenant to keep the premises in repair; the lessee paid a sum into Court, which was accepted by the lessor in satisfaction, and the action was discontinued. No repairs were done to the premises before the determination of the lease, after which date the lessor brought a fresh action against the lessee to recover damages for breaches of the covenants to keep in repair and deliver up in repair; the particulars in the action included the items of non-repair in respect of which the claim had been made in the first action, and also additional items arising since the date of that action. The official referee assessed the damages by determining the sum required at the end of the lease to put the premises into repair, and deducting therefrom the amount paid into Court and accepted by the plaintiff in the first action, together with a sum for depreciation:—

Held, that the money paid into Court in the first action must be taken to have been paid in and accepted as damages for the injury to the reversion, and not as being the sum then required to put the premises into repair, and that the damages in the second action had therefore been assessed upon the right principle.

MOTION to set aside the findings and judgment of an official referee.

The action was brought to recover damages for breaches of covenants to repair and to deliver up in repair contained in a lease of a house and garden made by the plaintiff to the defendant for twenty-one years from December 25, 1870; the covenants were the usual lessee's covenants. In February, 1888, the plaintiff, the lessor, served a notice upon the defendant, requiring him to put the premises in substantial repair, and setting out the dilapidations and the particulars of the requisite repairs. The defendant disregarded the notice and did no repairs, and in February, 1890, during the currency of the lease, the plaintiff

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commenced an action to recover damages for breaches of the covenants to repair, in which he claimed 425*l.* The defendant paid into Court 235*l.* as sufficient to satisfy the claim; that sum was accepted by the plaintiff in satisfaction of the claim in respect of which it was paid in, and the action was discontinued. Nothing was done by the defendant in the way of repairing before the termination of the lease on December 25, 1891, nor was any part of the 235*l.* spent on repairs. In January, 1892, after the termination of the lease, the plaintiff gave to the defendant a description of the dilapidations to the premises, and in April, 1892, the present action was commenced, in which the plaintiff alleged further breaches of the repairing covenants during the term and also breaches of the covenant to deliver up in repair at the end of the term, and claimed 1324*l.* as damages. From the particulars delivered by the plaintiff it appeared that his claim embraced all repairs required to be done to the premises, including those which had been contained in the particulars in the former action. The defence put in issue the plaintiff's right to recover damages in respect of any breaches in respect of which the 235*l.* had been paid into Court and accepted in the former action; in the alternative the Defendant paid 238*l.* 8*s.* 8*d.* into Court. The action was sent to an official referee, who found that the sum required to put the premises into repair was 571*l.* 5*s.*; from this he deducted the 235*l.* paid into Court in the former action and 23*l.* for depreciation, and gave judgment for 74*l.* 16*s.* 4*d.* beyond the 238*l.* 8*s.* 8*d.* paid into Court. The defendant now moved to set aside the findings and judgment on the ground that in assessing the amount of the damages the official referee had proceeded upon a wrong principle.

Witt, Q.C. (*W. E. Ball,* and *F. O. Robinson,* with him), for the defendant. The damages should have been assessed on the footing that a fresh start was made in February, 1890, the date when the first action was brought; in other words, damages should have been given only in respect of such breaches of covenant as had been committed since the first action, and no items of non-repair should have been taken into account which were, or could

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have been, included in the particulars in that action. It is immaterial whether the proper measure of damages in the first action was the injury to the reversion or the amount required to put the premises into repair; the payment into Court was in satisfaction of the plaintiff's claim—that is, it was the amount required to remedy the breaches of covenant by putting the premises into repair, and as the sum paid in was accepted by the plaintiff in satisfaction, it cannot now be contended that it was paid in and accepted in respect merely of the injury to the reversion.

Jelf, Q.C., and *Martelli*, for the plaintiff, were not called on.

WILLS, J. I am of opinion that this application should be dismissed. It seems to me that after the decision in *Joyner* v. *Weeks* (1) there is very little to be said in its favour. Two years ago the landlord, who was then the reversioner, brought an action for breach of the covenants to repair contained in the lease, and the tenant paid 235*l.* into Court, which was accepted in satisfaction. It is possible that in paying this sum into Court the defendant acted under a misapprehension of his legal liabilities, and thought that the measure of damages was the sum required to put the premises into repair; but it is also possible that he proceeded on the ground that he was aware that the true measure of damages was not the sum required to put the premises into repair, but the loss to the landlord measured by the depreciation in the saleable value of the reversion. It is clear that that is the law as to the measure of damages where the action for breach of the covenant to repair is brought during the currency of the tenancy. It must be taken, therefore, that the sum paid into Court two years ago did not represent the sum required to put the premises into repair, or that, if it did, it was an accident: the two measures of damage may often come to the same thing; they may often be different. It is impossible, therefore, to say that the defendant is entitled to treat that payment into Court as made upon the footing that it was the amount required to put the premises in repair. If he were, the

(1) [1891] 2 Q. B. 31.

contention on his behalf would be perfect, and we should accept the proposition that a fresh start must be made from the date of the first action, and that the defendant was only liable for breaches of covenant committed since that date—that is, for additional acts of non-repair. But the measure of damages being otherwise, I do not see how we can accept that view of what was done on that occasion.

In my judgment, the only way of treating this matter is that which has been adopted by the learned official referee. An action for breach of covenants to repair and leave in repair is brought at the end of the term, and a large sum of money claimed as damages; it is true that the sum paid by the tenant is often a sum preposterous in relation to the real damage to the landlord: as, where he is going to pull down the premises and is, therefore, not the loser by a penny because they are returned on his hands out of repair. In such a case, the rule of law may amount to putting into the landlord's pocket money far beyond the damage which he has actually suffered; but it must be remembered that there are difficulties on the other side, and that, but for this rule of law, a tenant who has broken his contract might come off better than if he had kept it; a result not to be lightly encouraged. It is not surprising that of these two principles the Court of Appeal has chosen that which they believed to be the workable one, that is, that at the end of the term, no matter how indifferent it may be to the landlord whether his premises are in perfect order or not, yet if the repairing covenants are not performed the landlord is entitled to recover the amount necessary to put them into repair. It is impossible for us in this case to treat the first set of damages as the equivalent of putting the premises in repair; we can only say that, when the end of the term comes and the landlord is entitled to put the premises in repair at the expense of the tenant who has broken his contract, he shall not have the money twice over, but shall, subject to an allowance for such depreciation as would have accrued, had the covenant been performed on the first occasion, between that date and the end of the term, subtract what was paid to him before from the amount that he now recovers. The case is abundantly clear when one

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appreciates what was said by the Court of Appeal in *Joyner* v. *Weeks* (1) as to the measure of damages.

LAWRANCE, J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Jull & Godfrey.*

Solicitors for defendant: *Saunders, Hawksford, & Bennett.*

W. J. B.

1893. *May* 10.

TADMAN *v.* HENMAN.

Landlord and Tenant—Distress—Want of Title in Lessor—Estoppel—Right to distrain Goods of Third Party.

Although a tenant who has been let into possession of land by a lessor is estopped from disputing his lessor's title, third persons, not claiming possession of the land under the tenant, are not so estopped. A person, therefore, who lets premises to which he has no title to a tenant, cannot distrain for arrears of rent due from the tenant the goods of a third person which happen to have been brought on to the premises by the tenant's licence.

ACTION tried before Charles, J., without a jury.

By a deed of conveyance dated July 30, 1847, the owners of a certain piece of ground in the parish of St. George-in-the-East, conveyed it to the Bishop of London and his successors upon trust to permit the premises and all buildings to be erected thereon to be for ever used for a school for the education of the children of the poor in the district of Christ Church in the said parish.

Schools were subsequently erected on a portion of the land so conveyed, the remaining portion of the land being used as a playground in connection with such schools. About the year 1882 the use of the buildings as schools was discontinued, in consequence of the erection of board schools in the neighbourhood. In 1888 the defendant was appointed vicar of the parish of St. Mary's, St. George-in-the-East, which parish includes the district of Christ Church above mentioned. The defendant as such vicar since his appointment had the possession and general control of the premises which were the subject of the conveyance.

(1) [1891] 2 Q. B. 31.

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By an agreement of tenancy dated December 29, 1890, the defendant let the piece of vacant ground, formerly used as a playground, to one Thomas Tadman, an undertaker, at a rent of 15*l.* a year for three years, for the purpose of storing thereon the hearse and carriages used in his business. In October, 1892, Tadman, being in difficulties, sold his stock-in-trade by auction, and his wife, the plaintiff, bought with money belonging to her as her separate estate the hearse and other portions of the stock-in-trade, and proceeded to carry on the business in her own name. She continued to keep the hearse, &c., upon the premises by her husband's permission.

On November 2, 1892, there was rent due from Tadman under the agreement and in arrear to the amount of 26*l.* 5*s.* The defendant accordingly distrained the plaintiff's hearse upon the premises for the said arrears of rent. The plaintiff brought an action for conversion.

Coleridge, Q.C., and *W. H. Stevenson*, for the plaintiff. The defendant had no right to distrain the plaintiff's goods. A right of distress must depend on the existence of a reversion in the lessor. But the defendant had no such reversion; he had no title to the land at all. It was vested in the Bishop of London. It may be that the plaintiff's husband having been let into possession by the defendant was estopped from disputing his title, but there is nothing to estop the plaintiff herself.

Winch, Q.C., and *Gye*, for the defendant. No question of estoppel arises here. There existed a relationship of landlord and tenant de facto, and that is sufficient for the defendant's case. So long as such a de facto relationship continued all the incidents of a valid tenancy attached, including the right to distrain any goods on the premises to whomsoever belonging. It is only when the tenant seeks to set up some claim inconsistent with that relationship that the question of the landlord's title becomes material. If, however, the defendant is wrong upon that point, and it was necessary to shew a title in him, then it is conceded that his only title was one by estoppel; but by that estoppel the plaintiff is as much bound as her husband. Not only is a tenant estopped from disputing his

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lessor's title, but any one who occupies the premises under the tenant is equally estopped, whether he so occupies as assignee of the lease: *Doe* d. *Bullen* v. *Mills* (1); *Taylor* v. *Needham* (2), or as undertenant; *Doe* d. *Spencer* v. *Beckett* (3), or as licensee. For this purpose a licensee is in the same position as a tenant: *Doe* d. *Johnson* v. *Baytup*. (4) Here the plaintiff carried on her husband's former business, and virtually occupied the premises for the purposes of that business.

Coleridge, Q.C., in reply. The cases cited are inapplicable. They are all cases of ejectment. No doubt a person who directly or indirectly obtains possession of premises through a lessor cannot in an action of ejectment brought by the lessor rely on his possession to force the lessor to prove his title. But here the plaintiff does not claim any title to the land, but only to the goods upon it.

CHARLES, J. The plaintiff in this case is the wife of one Tadman, and she sues the defendant for the conversion of a hearse, which formed part of her separate estate. The hearse in question was, by the permission of her husband, placed on some land which the defendant had professed to let to Tadman on a three years' agreement. The rent which Tadman ought to have paid under that agreement being in arrear, the defendant distrained the hearse, and the question is whether he had any right so to distrain. Now, the land was not the defendant's to let; he had no title to it whatever. The only person who had any title to it was the Bishop of London, and there is no evidence that the letting by the defendant was authorized or ratified by the bishop. It is true that, notwithstanding the absence of title in the defendant, and the consequent invalidity of the agreement of tenancy, the tenant Tadman himself having been let into possession by the defendant under the agreement, cannot be heard to say that the defendant had no right to make the agreement. He is estopped from disputing his lessor's title. So far as Tadman is concerned, the rent is payable, and the ordinary incidents of a valid tenancy are applicable; so that, on

(1) 2 A. & E. 17.
(2) 2 Taunt. 278.
(3) 4 Q. B. 601.
(4) 3 A. & E. 188.

non-payment of rent, Tadman's goods would be liable to be distrained. But the hearse distrained was not Tadman's, but his wife's. Does, then, the estoppel which binds him extend also to her? It is contended that, as she brought the article upon the premises by the licence of her husband, she is so bound; and in support of that contention the case of *Doe* d. *Johnson* v. *Baytup* (1) was cited. It was there held that a person who had got into possession of premises by the licence of the lessor of the plaintiff could not defend an ejectment, but was estopped from disputing the title of the lessor of the plaintiff, and that in this respect there was no distinction between a tenant and a licensee. But upon a comparison of that case with that of *Doe* d. *Knight* v. *Smythe* (2), I have come to the conclusion that its principle has no application to the case before me. All that it decides is that a defendant in ejectment who has got into possession by the plaintiff's licence cannot turn round upon the plaintiff and say, "I am in possession; if you want to turn me out, shew your title"; but if he wishes to dispute the plaintiff's title to the land, must first give up possession to the plaintiff, from whom he obtained it. That case concedes that a tenant or licensee may always dispute his lessor's or licensor's title, provided he first gives up possession of the premises. But here, Mrs. Tadman had no possession of the premises to give up. It is true that she brought her goods on to the premises by the licence of her husband, who was the defendant's tenant; but she did not claim thereby to acquire any possession of or interest in the premises. The case relied upon, therefore, does not apply. It seems to me that it would be unreasonable to hold that the mere fact of her bringing her goods on to the premises by the tenant's licence estops her from disputing the validity of the instrument of demise under which the tenant holds. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *F. Deakin.*

Solicitors for defendant: *Barron & Son.*

(1) 3 A. & E. 188.

(2) 4 M. & S. 347.

1893
June 14.

MIDLAND RAILWAY COMPANY *v.* MARTIN & CO.

Estoppel — Metropolitan Magistrate — Detention of Goods under 15*l. value within Metropolitan Police District — Order of Magistrate for Delivery up of Goods — Action for Special Damage arising out of same Detention — Metropolitan Police Courts Act,* 1839 (2 *&* 3 *Vict. c.* 71), *s.* 40.

A person who obtains an order from a police magistrate under s. 40 of the Metropolitan Police Act, 1839, for the delivery up of goods improperly detained is not thereby precluded from subsequently bringing an action for special damage arising out of the same detention.

APPEAL from the county court of Croydon.

The defendants, who were builders at Croydon, purchased of a firm in Glasgow certain rain-water pipes and gutters to be used in a certain building which the defendants were then in course of erecting. The goods were consigned for carriage to Croydon by the plaintiffs' railway, and the carriage was prepaid by the consignors. Notwithstanding such prepayment, the plaintiffs claimed to have a lien upon the goods, and refused to deliver them up to the defendants until an account of the defendants' relating to the carriage of a different parcel of goods had been paid. The defendants upon such refusal summoned the plaintiffs in a metropolitan police court under s. 40 of the Metropolitan Police Act, 1839 (1), for illegally detaining the goods, and obtained an order for their delivery.

(1) By the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71, s. 40), it is enacted that: "Upon complaint made to any of the said magistrates by any person claiming to be entitled to the property or possession of any goods which are detained by any other person within the limits of the metropolitan police district, the value of which shall not be greater than 15*l.* . . . it shall be lawful for such magistrate to summon the person complained of, and to inquire into the title thereto or to the possession thereof, and if it shall appear to the magistrate that such goods have been detained, without just cause . . . it shall be lawful for such magistrate to order the goods to be delivered to the owner thereof . . . and every person who shall neglect or refuse to deliver up the goods according to such order shall forfeit to the party aggrieved the full value of such goods, not greater than the sum of 15*l.*, such value to be determined by the magistrate: Provided always that no such order shall bar any person from recovering possession of the goods or money so delivered or forfeited by suit or action at law from the person to whose possession such goods or money shall come by virtue of such order, so that such action shall be commenced within six calendar months next after such order shall be made."

Rainy weather set in about the time of the plaintiffs' refusal to deliver up the pipes and gutters, and the defendants' building, on which they were intended to be used, was alleged to have suffered serious damage by reason of the detention, owing to the rain soaking into the plaster of the walls. The plaintiffs having brought an action in the county court to recover certain charges in respect of another matter, which charges were not disputed, the defendants counter-claimed for the special damage arising from the detention of the pipes and gutters above mentioned. At the hearing the plaintiffs took a preliminary objection to the defendants going into their counter-claim, that the order obtained in the police court was a bar to a second proceeding in respect of the same detention. The judge upheld the objection.

The defendants appealed.

Colam, for the defendants. The county court judge was wrong in treating the counter-claim as res judicata, for the cause of action before him differed from that before the police magistrate in this respect, that the latter had no power under the statute to award the special damage sought to be recovered in the county court. This distinguishes the case from *Wright* v. *London General Omnibus Co.* (1), where an award of compensation by a magistrate against an omnibus driver upon an information for furious driving under 6 & 7 Vict. c. 86, s. 28, was held to be a bar to a subsequent action against the driver's employers in respect of his injuries.

[He was stopped by the Court.]

Loehnis, for the plaintiffs. The cause of action was the same before both tribunals, namely, the detention of the goods. The damage to the building was merely consequential. If the defendants had in the first instance brought an action in the county court for the return of the goods, it is clear that they could not afterwards have brought a second action for the special damage. They could not have split their claim. But if they were not entitled to split their claim by bringing two separate proceedings in the same Court, why should they be allowed to split their claim by bringing two separate proceedings in different Courts?

(1) 2 Q. B. D. 271.

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It is true that the magistrate had no jurisdiction to give special damage of the kind now claimed; but that does not make the cause of action any the less the same. He had jurisdiction to give damages (viz., the value of the goods if not delivered up) though not such high damages as would have been obtainable in the county court. But measure of damages is one thing, cause of action is another. The defendants well knew when they took their proceedings in the police court that the measure of damages obtainable there was less than in the county court; but they must be taken to have elected to waive the special damage in consideration of the speedier and cheaper remedy. The maxim that "Nemo debet bis vexari pro eâdem causâ" applies.

[He referred to *Dover* v. *Child.* (1)]

MATHEW, J. This appeal must be allowed. There is no pretence of suggesting that this question of the special damage to the defendants' building was gone into and disposed of before the magistrate. The defendants had two alternative remedies in respect of the detention of the goods: they could either sue in the county court for the delivery up of the goods, or they could take proceedings in the police court under 2 & 3 Vict. c. 71. They adopted the latter course, and the magistrate made the order asked for. Then they subsequently make a claim in the county court for the special damage. I am of opinion that they are entitled to do so. It is not res judicata, for it is a matter with which the magistrate had no jurisdiction to deal. The case must go back for a new trial.

WRIGHT, J. I am of the same opinion. The magistrate had no power to deal with this part of the case; consequently the doctrine, that where a person has two alternative remedies in respect of the same subject-matter he is put to his election between them, has no application here. The proceeding before the magistrate and the subsequent counter-claim in the county court were not in respect of the same thing. The former was only a summary remedy for the return of the goods, and nothing more. The principle laid down in *Nelson* v. *Couch* (2), that, to

(1) 1 Ex. D. 172. (2) 15 C. B. (N.S.) 99.

constitute a good plea of res judicata, it must be shewn that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second, is that upon which this appeal must be decided.

Order for new trial.

Solicitors for plaintiffs: *Beale & Co.*

Solicitors for defendants: *Ranger, Burton, & Co.*

J. F. C.

OVERSEERS OF WALTON-ON-THE-HILL *v.* JONES.

1893
May 8.

Poor-rate—Tenant for Term not exceeding Three Months—Rate made for period of a Year—Claim to pay by Instalments—Demand, Sufficiency of—Poor Rate Assessment and Collection Act, 1869, 32 & 33 *Vict. c.* 41, *s.* 2.

By the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), an Act for amending the law with respect to the rating of occupiers for short terms, s. 2, "No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of a year":—

Held, that where any such occupier after having been served with a demand in writing for the full amount of a rate claims to pay under the section such rate by instalments, a distress warrant may be issued for non-payment of any such instalment upon proof that it was orally demanded by the overseers.

CASE stated by justices.

By s. 2 of the Poor Rate Assessment and Collection Act, 1869, "No occupier (of a hereditament let to him for a term not exceeding three months) shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year."

By article 1 of the General Order of the Local Government Board, dated June 14, 1875, it is ordered that the demand note for the payment of any poor-rate shall be in a certain prescribed form, and shall be "left with the ratepayer, or at his address, when the payment of any poor-rate either in one sum or by instalments is first demanded."

A poor-rate for the township of Walton-on-the-Hill was made on April 11, 1892, for a period ending on March 25, 1893. Such rate was not made payable by instalments. The respondent was

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OVERSEERS OF WALTON-ON THE-HILL v. JONES.

the occupier of a dwelling-house in the township, and was assessed to the said rate accordingly, the amount of the rate payable by him for the whole period being 1*l.* 12*s.* 6*d.* On May 12, 1892, a demand note in the prescribed form, for the full amount of 1*l.* 12*s.* 6*d.*, was served upon him. He objected to pay the full amount so demanded on the ground that the house was let to him for a term not exceeding three months. On September 26, 1892, he paid to the appellants, the overseers, the sum of 8*s.* 1*d.*, being the amount of the rate due for one quarter of the year. On November 11, the appellants' collector orally demanded a further sum of 8*s.* 1*d.*, being the amount due for the second quarter. The respondent having failed to pay such sum, the appellants applied to the justices for a distress warrant. The justices held that they had no jurisdiction to issue a distress warrant, on the ground that a separate demand note in the prescribed form ought to have been served on the respondent in respect of each quarter's payment as it became due, and that an oral demand was insufficient. They accordingly dismissed the summons, subject to a case for the opinion of the Court.

Macmorran, for the appellants.

No counsel appeared for the respondent.

GRANTHAM, J. This case is perfectly clear. Where the occupier claims the privilege under the Act of paying at one time only so much of the rate as would be due for one quarter, one written demand for the whole amount is enough.

VAUGHAN WILLIAMS, J., concurred.

Appeal allowed.

Solicitors for appellants: *Sharpe, Parker & Co., for Cleaver, Holden & Co., Liverpool.*

J. F. C.

[IN THE COURT OF APPEAL.]

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1893

June 13.

MILLER *v.* HANCOCK.

Negligence—Dangerous Premises—Building let in Flats—Staircase out of Repair—Landlord, Liability of, to Persons other than Tenants—Implied undertaking to Repair Staircase.

The defendant was the owner of a building in the City, the different floors of which were let by him separately as chambers or offices, the staircase, by which access to them was obtained, remaining in the possession and control of the defendant. The plaintiff, who had in the course of business called on the tenants of one of the floors, fell, while coming down the staircase, through the worn and defective condition of one of the stairs, and sustained personal injuries. The plaintiff having sued the defendant in respect of such injuries:—

Held, that there was by necessary implication an agreement by the defendant with his tenants to keep the staircase in repair, and, inasmuch as the defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition, and the action was therefore maintainable.

Application by defendant for judgment or new trial.

The action which was to recover damages for personal injuries, was tried before Lawrance, J., with a jury, when the facts, so far as material to this report, appeared to be as follows:—

The defendant was the owner of a building in the City, known as Cannon Street Chambers, the different floors of which were let by him as separate tenements for the purposes of business chambers or offices. There was a staircase in such building, by which access was obtained to the first and second floors, and to a room above on the third floor. The second floor had been let to Messrs. Gwynne & Co., engineers and iron founders, since 1876. There was a caretaker living on the premises, who attended to the offices and staircase. He was allowed by the defendant to inhabit the room on the third floor rent free, but was selected and paid by the tenants. The agreements for letting the floors contained no reference to the staircase. The Court, as will be seen, were of opinion that the evidence shewed that the staircase remained in the possession and control of the defendant. The plaintiff was a collector in the employment

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of the Midland Railway Company, who was in the habit of calling upon Messrs. Gwynne & Co. for the purpose of collecting amounts due from them to the railway company. The plaintiff, when coming down the flight of stairs between the second and first floor, after calling upon Messrs. Gwynne & Co. in the course of his employment, fell down through one of the stairs being in a worn and defective condition, and broke his leg. The jury found that the stairs were in an unsafe condition and that the accident arose through their condition, and gave a verdict for the plaintiff for 200*l.* damages.

The defendant applied for a new trial or judgment on the ground that there was no evidence of liability on the part of the defendant.

R. M. Bray, for the defendant. It is not suggested that the staircase was out of repair when the original letting to Messrs. Gwynne & Co. took place. The tenants of the upper floors let by the defendant had, no doubt, by necessary implication, an easement over the staircase for the purpose of access to their premises; but there was no implied agreement by the defendant to keep the staircase in repair: *Colebeck* v. *Girdlers Co.* (1) The law is that the owner of the dominant tenement must do such repairs as may be necessary for the enjoyment of his easement: Gale on Easements, 6th ed., p. 465; *Pomfret* v. *Ricroft.* (2) Therefore, as between themselves and the defendant, it was for the tenants to do the repairs which might be necessary to afford safe access to their premises. A stranger resorting to the premises can be in no better position than the tenant as against the landlord. The landlord knows nothing about the state of the stairs. He does not invite persons who have business with the tenants to use the stairs. It is the tenant who invites them, and who knows the condition of the stairs. There may be a good cause of action against Messrs. Gwynne & Co., but there is none against the defendant.

[BOWEN, L.J., referred to *Smith* v. *London and St. Katharine Docks Co.* (3)]

(1) 1 Q. B. D. 234. (2) 1 Wm. Saund. 322.
(3) Law Rep. 3 C. P. 326.

That case is distinguishable. There the defendants clearly undertook to provide gangways, and there was what amounted to an invitation by them to persons to use such gangways as a means of access to the ship.

Moyses, for the plaintiff, was not called upon.

LORD ESHER, M.R. In this case the defendant was the owner of a building in the City, consisting of several floors. It appears that he let the rooms on the first and second floors respectively as separate tenements to different tenants. I gather that he kept in his possession some part of the house, at any rate, one room in it, and he did not let the staircase, the only mode of access which the tenants had to their respective tenements. So much of the house, whatever it might be, as the defendant did not let, and therefore this staircase, remained in the possession and control of the defendant. What, under such circumstances, are the rights of the tenants and the duties of the landlord towards them? Their only mode of access to their tenements was, as I have said, by this staircase. This may be called an easement, but it was, in my opinion, under the circumstances, such an easement as the landlord was bound to keep so as to afford a reasonably safe entrance and exit to the tenants. It seems to me that there is an implied obligation on the part of the landlord to the tenants to that effect, or else he is letting to the tenants that which will be of no value to them. What is the use of a second floor to any one, if the staircase, by which alone there can be access to it, is to be allowed to go to ruin? Furthermore it is obvious that in such a case the landlord must know that premises so let will be of no use to tenants, unless those who supply or deal with the tenants, such as tradesmen or others having business with them, also have access to the premises. He must know that such people will go up and down the stairs; and those, who go up and down a staircase left open in premises of this kind in the City, would naturally suppose that such staircase would, in the ordinary course of things in regard to such premises, be under the control of and looked after by the landlord of the premises. Under those circumstances, I think that there is a relation between the landlord and those who resort to the premises for business

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Lord Esher, M.R.

purposes, from which a duty arises on the part of the landlord to keep the staircase, which is the means of access to the premises, in reasonably safe repair. Is there any authority for that proposition? It seems to me that the case of *Smith* v. *London and St. Katharine Docks Co.* (1) is an authority for the line of reasoning which I have adopted in this case. There the defendants, a dock company, provided gangways as a means of access to ships lying in their dock. There appears to have been no express contract between the defendants and the shipowner as to these gangways; but it was the ordinary course of business that they provided them, and so there would be an implied contract to provide them. In the nature of things they would be necessary for the use, not only of the crew, but also of other persons having business with the ship. The Court said that the defendants must have known that they would be used by such persons; and, that being so, there was a duty on their part towards persons, between whom and them there was no other relation than that created by going on board the ship on business, to have such gangways in a safe condition. Similar reasoning appears to me to apply to this case. For these reasons I think the application must be refused.

BOWEN, L.J. I am of the same opinion. The defendant was the owner of certain premises, which he let out in flats to tenants. The plaintiff was a collector for a railway company, who had in the course of business called upon the tenants of one of the flats, and who in coming down the staircase from their premises fell down, through a defect in the stairs, and broke his leg. The liability of the defendant appears to me to be clear, both on reason and authority. The defendant let the flats to tenants; but it seems to me plain, upon the facts, that the staircase remained in his occupation and control. The tenants could only use their flats by using the staircase. The defendant, therefore, when he let the flats, impliedly granted to the tenants an easement over the staircase, which he retained in his own occupation, for the purpose of the enjoyment of the flats so let. Under those circumstances, what is the law as to the repairs of the staircase?

(1) Law Rep. 3 C. P. 326.

It was contended by the defendant's counsel that, according to the common law, the person in enjoyment of an easement is bound to do the necessary repairs himself. That may be true with regard to easements in general, but it is subject to the qualification that the grantor of the easement may undertake to do the repairs either in express terms or by necessary implication. This is not the mere case of a grant of an easement without special circumstances. It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary course of business with the tenants; because, of course, a landlord must know when he lets a flat that tradesmen and other persons having business with the tenant must have access to it. It seems to me that it would render the whole transaction inefficacious and absurd if an implied undertaking were not assumed on the part of the landlord to maintain the staircase so far as might be necessary for the reasonable enjoyment of the demised premises. If that be so, the case is brought within the dictum of Lord Mansfield in *Taylor* v. *Whitehead* (1), to the effect that by the common law he who has the use of a thing ought to repair it, but the grantor may bind himself. When the conclusion is once arrived at that there is such an implied undertaking by the landlord, the rest seems to me to follow by a course of reasoning which is clear and which is covered by authority. The landlord has given the tenant a right to use the staircase, and undertaken to keep it in repair; and he knows that persons who have business with the tenant will be coming up and down the stairs, and those persons will use the stairs on the understanding that they may lawfully do so, and that in doing so they will be shielded by the responsibility of the person on whom the liability to repair the staircase may rest. That being so, the case appears to me to be brought

(1) 2 Douglas, 745.

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within the principle upon which *Smith* v. *London and St. Katharine Docks Co.* (1) was decided. In my opinion it is clear, both on principle and authority, that a duty was imposed by law upon the defendant towards persons using the staircase in the course of business with the tenants to keep it reasonably safe.

KAY, L.J. I am of the same opinion. The question here raised is really whether the duty to keep the staircase in a safe condition fell upon the landlord or the tenant. As I understand the facts, the staircase was not let, but was retained by the landlord in his own possession; the tenants of the flats, however, had the right to use the staircase, and therefore had an easement over it. It may be that, in order to preserve such an easement, as between himself and the landlord, the tenant might have a right to repair the staircase; but that does not conclude the question whether it was the duty of the landlord, as between himself and the tenant, or as between himself and persons in the position of the plaintiff, i.e. persons who might go up and down the staircase in the course of business with the tenant, to keep the staircase in such a condition that it might be safely used. It seems to me that, under the peculiar circumstances of this case, a duty existed on the part of the landlord to keep the staircase in a safe condition, and therefore that the plaintiff is entitled to maintain his action.

Application dismissed.

Solicitors for plaintiff: *Lovett & Co.*
Solicitors for defendant: *Sandilands & Co.*

(1) Law Rep. 3 C. P. 326.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1893
June 1.

ZIERENBERG AND WIFE *v.* LABOUCHERE.

Practice—Libel—Justification—Particulars—Facts on which Defendant relies in support of Justification—Order XIX., *rr.* 6, 7.

In an action of libel, where the charge made against the plaintiff in the alleged libel is general in its nature, a defendant who pleads a justification must state in his particulars the facts on which he relies in support of his justification.

Judgment of the Queen's Bench Division affirmed.

APPEAL from a judgment of the Divisional Court, affirming an order of a judge at chambers for further and better particulars.

The action was brought in respect of an alleged libel published in a newspaper of which the defendant was proprietor. The general effect of the alleged libel was to bring a charge against the plaintiffs, who were husband and wife, that, under pretence of carrying on a home for inebriates, they obtained money from charitable persons to be devoted to that purpose, and retained it for their own use. The article averred that the plaintiffs were "charity swindlers" and "impostors," and that the home was "a monstrous swindle." There were other allegations reflecting on the conduct and character of the defendants to which it is not necessary further to refer as the sufficiency of the particulars as to these matters was not in question. The defendant pleaded a justification in general terms that the statements complained of were true. An order was thereupon obtained for the delivery of particulars covering all the statements of the alleged libel, and among other things requiring particulars "of how and in what way the plaintiffs were 'charity swindlers' and 'impostors,' and the home was a 'monstrous swindle,' and of the facts and matters relied on in support of such allegations, and when they occurred." To this the defendant replied, "The plaintiffs by the annual reports, prospectuses, and appeals issued by them to the subscribers and the public represented the St. James' Home as a home for female inebriates, and invited subscriptions and donations for the home, on the ground that it was a home for female inebriates, and such subscriptions and donations as were

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paid were paid upon the faith of that representation and invitation, whereas in fact the home was conducted and managed as a commercial undertaking, and in such a way as to further the success of the undertaking rather than the welfare of its inmates, and so that the plaintiffs could benefit themselves by the carrying on of the home. The facts and matters relied on are all the facts and matters stated in the alleged libel (within certain specified limits), and in addition the following facts and matters, viz.: that no proper system of books or accounts shewing the receipts and expenditure of the home was kept, and that no proper vouchers were submitted to the auditors for the purpose of preparing the annual balance sheets, and that the balance sheets do not shew the real or entire receipts or expenditure of the home, and that the plaintiffs by means of the home were enabled to live free of expense to themselves, and that they appropriated for their own purposes monies received for or earned by the home, and they caused statements to appear in the annual balance sheets of the home, of cash supplied by the female plaintiff and loans made by the male plaintiff, which were not in fact supplied or lent out of their own monies, but in reality out of the monies of the home, and the time when the aforesaid facts and matters occurred was the whole time the home has been open since its institution in 1876." After delivery of these particulars a master, on the application of the plaintiffs, made an order for further particulars, setting out, among other things, "the receipt of monies appropriated by the plaintiffs for their own purposes, and not accounted for, and of the persons from whom and the dates when such monies were received, and in what way the expenditure of the home was not shewn by the balance sheets," and that the defendant should be precluded from giving any evidence in support of his justification in respect of the matters as to which he did not give the particulars ordered. This order was confirmed by the judge at chambers and the Divisional Court.

The defendant appealed.

1893. May 30. *R. T. Reid, Q.C.*, and *J. Eldon Bankes*, for the defendant. The defendant is not bound to give further parti-

culars, or, at all events, is not bound to give them with the minuteness asked for. His justification is general and depends on the general conduct of the defendants in managing the home and not on the misappropriation of any particular subscriptions. The answers sufficiently indicate the nature of the evidence which the defendant will bring forward, and he ought not to be called on to disclose the names of his witnesses. At all events, he ought to have discovery before being required to give further answers: *Leitch* v. *Abbott*. (1)

[They also cited *Hickinbotham* v. *Leach* (2), and *Gourley* v. *Plimsoll*. (3)]

Sir E. Clarke, Q.C. (*C. C. Scott*, with him), for the plaintiffs, was stopped. [He cited *J'Anson* v. *Stuart*. (4)]

J. Eldon Bankes, replied.

Cur. adv. vult.

1893. June 1. LORD ESHER, M.R. In this case the plaintiffs have brought their action charging that the defendant has libelled them, and they have set out in the statement of claim that which they say is the libel. The matter so set out contains a great many separate statements said to be libellous; but the defendant does not confine his plea to any particular part, but, as he has a right to do, pleads generally to the whole a justification that it is true. The plaintiffs say that the defendant pleading a justification in libel must give particulars, and have taken out a summons for particulars, not asking for them in general terms; but, according to the usual practice, pointing out the matters as to which particulars are required. The defendant has given particulars, and, as to some of them, the plaintiffs are satisfied of their sufficiency, but as to other matters they say that no particulars have, in fact, been given, or that the particulars are in general terms and insufficient, and ought to be supplemented by further particulars giving more specific information. The defendant objects to giving any further particulars, and what we have to decide is whether he is bound to give them or not. The defendant raises the question in this way: he says he ought not

(1) 31 Ch. D. 374.
(2) 10 M. & W. 361.
(3) Law Rep. 8 C. P. 362.
(4) 1 T. R. 748.

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to be obliged to give any further particulars; but he says further that the questions put to him are too minute, and he raises this further point that if he is to answer those questions he ought not to be obliged to do so at the present time, but ought to be allowed discovery by means of interrogatories, and inspection of books, before he is called on to do so.

Strictly speaking, the defendant, having pleaded generally a justification of the whole libel, would be bound to prove the whole to be true, and if he failed in doing so, it might be said that his plea of justification failed altogether. That would have been the old practice; but that seems to be too strict a view of the rights of the parties to take at the present time, and I think we ought to treat the case as if the statements in the claim were statements of separate libels and the general plea of justification as if it applied to each part of the claim.

That a general plea of justification of a libel without particulars of that justification is bad has been the law from the earliest times. This is illustrated by the judgments of Ashurst and Buller, JJ., in *J'Anson* v. *Stuart*. (1) The former says in giving judgment: "When he"—that is, the defendant—"took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea: Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life." That is a leading case on the subject, and at the time when it was decided it was necessary to put the particulars in the plea. Afterwards the practice was varied, and a defendant could make his plea general; but he was still bound before he went to trial to give as particulars the same matters that he would formerly have been bound to put in his plea. The mode of dealing with such a case as this is stated by Parke, B., in *Hickinbotham* v. *Leach* (2): "It is a perfectly well-established rule in cases of libel or slander, that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff." And in that case, during the argument, Alderson, B., at page 363,

(1) 1 T. R. 748. (2) 10 M. & W. 361, at p. 363.

said: "The plea ought to state the charge with the same precision as in an indictment." That, I think, must now be read in this way: "If the instances are not put into the plea the particulars must be as precise as would be necessary in an indictment." Treating the case then by way of indulgence to the defendant, as though he had picked out this particular libel with which we are now dealing, and stated that it was true, we must consider whether he has given particulars which are sufficient. The libel is in effect that the plaintiffs are "charity swindlers and impostors and the home is a monstrous swindle." That is a general statement, and he is asked for particulars, that is, for the instances on which he relies to justify that statement, and he says: "The instances are that they appropriated for their own purposes monies received for, or earned by, the home, and they caused statements to appear in the annual balance-sheets of the home of cash supplies by the female plaintiff, and loans made by the male plaintiff, which were not, in fact, supplied or lent out of their own monies, but in reality out of the monies of the home." Is that answer sufficient? No doubt it states the way in which the defendant means to justify; but it is almost as general as the statement in the alleged libel. It does not give the instances, nor does it state the times or occasions on which the swindles are alleged to have been done, nor does it give the names of the persons whose money is alleged to have been misappropriated. In old days a plea that did not give such particulars of justification would have been bad, and at the present time particulars that fail in this respect are insufficient. Therefore, being of opinion that these statements in the particulars are not sufficiently precise as to the instances on which the defendant means to rely, we must agree with the Divisional Court that the defendant must give further particulars, and if he does not, his justification as to that part of the libel must fail, and he will not be allowed to go into it.

The defendant, however, alleges that the particulars asked for are too minute, and would hamper him in his defence—that is to say, that he ought not to be called on to give names because he would be giving the names of his witnesses. If the particulars are those that he ought to give, he cannot refuse to

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do so merely on the ground that his answer will disclose the names of the witnesses he proposes to call. On this point all that we say is, that the plaintiffs are within their rights in asking for these particulars, but whether the defendant can in his answer give any reasonable excuse for not answering as to some of the matters raised is a question we do not go into.

I now come to the contention that the defendant ought not to be made to answer now, but should be allowed discovery by way of interrogatories and inspection before being called on to do so. This is not a case in which, before the action was brought, there was any relation between the parties, such for instance as that of principal and agent which would entitle the defendant to discovery. The only connection between them is that of plaintiffs and defendant in an action for libel, and the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know. Here the justification, for want of sufficient particulars, is not a well-pleaded defence, and till there is such a defence there can be no right to discovery, in the absence both of the relationship of which I have spoken and of any special circumstances. The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery.

Upon principle and authority the defendant's contention that he is not bound to give the particulars till he has had discovery fails. A case was cited (1) that was said to shew the contrary and to prove that there was now a new state of the law, the result of the Judicature Acts, but in that case there existed a relationship between the parties which gave a right to discovery before plea, and the decision was founded on the existence of that relationship, so that the case is no authority for the contention of the defendant. The decision of the Divisional Court will therefore be affirmed.

(1) *Leitch* v. *Abbott*, 31 Ch. D. 374.

BOWEN, L.J. I am entirely of the same opinion.

The following judgment was read by

KAY, L.J. The argument in this case, in one view of it, seems to involve the question whether mere suspicion can justify a libel. It is urged that the so-called particulars, which are in terms as general as the libel complained of, ought not to be made more definite at present, because until the defendant has obtained discovery from the plaintiff, he may not be able to give particulars in any better form. The defendant in a libel action may plead a justification. But it is no justification to plead simply that the alleged libel is true. That, as has been pointedly said, is not justification but is merely repeating the libel: *J'Anson* v. *Stuart*. (1) Accordingly the practice required that the plea should state facts which justified the defendant in publishing the language complained of. This is clear from the decision in *Hickinbotham* v. *Leach* (2), and the authorities referred to in that case: *Jones* v. *Stevens* (3); *Newman* v. *Bailey* (4); *J'Anson* v. *Stuart* (1); *Holmes* v. *Catesby*. (5)

It is said that the modern practice is not to state the facts relied on as a justification in the pleading, but to add them in particulars. I presume this is done under Order XIX., rr. 6, 7. But then the particulars should be as explicit as the plea was required to be before.

If the defendant says that he is unable to state any such facts without discovery, the answer is simple and conclusive—he ought not to have published the libel, and cannot plead any justification for having done so.

The case of a charge of fraud against an agent, or a breach of trust against a trustee, by pleading only, where no libel has been published otherwise, is essentially different. There the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the Court in requiring the defendant

(1) 1 T. R. 748.
(2) 10 M. & W. 361.
(3) 11 Price, 235.
(4) 2 Chit. Rep. 665.
(5) 1 Taunt. 543.

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to make discovery before the plaintiff is called on to give particulars, because the fiduciary relation of the defendant to the plaintiff entitles the plaintiff to all the knowledge which the defendant may have, and it is not uncommon, when a conflict arises between the right of the plaintiff to discovery, and the right of the defendant to particulars, in such cases to postpone the giving of particulars until the discovery has been made: *Leitch* v. *Abbott* (1); *Sachs* v. *Speilman.* (2)

But to apply this practice to the case of libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement, because he believed he could by the process of discovery elicit such facts.

It is urged that if the facts are stated before discovery is given that the discovery will be limited to the particular facts so alleged. I am not satisfied that this will necessarily be so. I can conceive a case in which a libel in general terms may be justified by certain facts stated in the particulars, and that there may be power to obtain discovery of other analogous facts which may support the justification. But even if it were so limited, that is no reason why the particulars should not be as definite or explicit as the defendant can make them. It seems to me a much less evil, if it be an evil, to confine the discovery to the particular facts adduced as a justification, than to give the smallest sanction to a libel unsupported by facts which justify the publication.

There is another obvious reason for requiring precise particulars, namely, that the plaintiff may know the case he has to meet and what acts it is alleged have been committed which justify the general charge against him. But this is a consideration not peculiar to libel cases.

I am of opinion that the particulars complained of are too general; that they are not particulars at all, but a mere repetition of part of the libel, and that further and better particulars ought to be given.

There remains the question whether the penalty if better particulars are not given is not as it now stands too large. A libellous statement as to which no particulars are given, ought

(1) 31 Ch. D. 374. (2) 37 Ch. D. 295.

not to be allowed to be justified at all. But where some facts are stated in the particulars by way of justification which may or not be sufficient, it is argued that the defendant should not be prevented from relying on them at the trial simply because he has added a general statement which in itself is not sufficient. However, I am not satisfied that this argument applies in the present case. I do not think that any facts are stated as a justification in this case in the particulars complained of, and, therefore, the penalty imposed is not too large.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co.*
Solicitors for defendant: *Lewis & Lewis.*

A. M.

LEWIS *v.* THE EARL OF LONDESBOROUGH.

1893 *June* 15.

Practice—Discovery—Photographs of Documents—Order XXXI., *r.* 14; *Order* L., *r.* 3.

The Court has power to allow a party to an action to take photographs of documents in the possession of the other party.

APPEAL of the plaintiff from an order of a master allowing the defendant to take photographs of certain bills of exchange on which the plaintiff sued him as acceptor. The defendant stated on affidavit that he believed that the acceptances were forged, and the defendant's solicitors that they required facsimiles of the bills in order to prepare the defence. Wills, J., referred the matter to the Court.

Pollard, for the plaintiff. There is no precedent for the order. The defendant is entitled to have the bills produced for inspection by experts; but he is not entitled to have the bills photographed.

[WRIGHT, J., referred to Order XXXI., r. 14, and Order L., r. 3. (1)]

(1) By Order XXXI., r. 14: "It shall be lawful for the Court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as

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Lockwood, Q.C., and *A. T. Lawrence*, for the defendant, were not heard.

MATHEW, J. I am of opinion that this appeal should be dismissed. The learned counsel for the plaintiff admits that the Court can order the bills to be produced for examination on behalf of the defendant for the purposes of the trial, and that each person employed to examine them would be entitled to sufficient time to enable him fully to appreciate the character of the documents; but he objects to the use of photography. The Court has, however, clearly power to allow copies of the bills to be taken, and there is no better mode of obtaining exact copies than by directing the bills to be photographed. The rules to which my learned brother has referred, give, as it seems to me, ample power to make the order; and I think that, apart from them, we could make it under our general powers, if we thought that justice so required. The bills will be placed in the custody of the officer of the Court, and will be photographed in his presence.

WRIGHT, J., concurred.

Appeal dismissed.

Solicitor for plaintiff: *A. E. Sydney.*

Solicitors for defendant: *Saltwell, Tryon, & Saltwell.*

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the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

By Order L., r. 3: "It shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and, for all or any of the purposes aforesaid, to authorize . . . . any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1893
June 26.

BENTSEN *v.* TAYLOR, SONS & CO.

Practice—Foreign Plaintiff resident Abroad—Motion for New Trial—Security for Costs.

The plaintiff, a foreigner resident abroad and having no property in England, gave security for the costs of the action. The action was tried and a verdict passed for the defendants. The plaintiff gave notice of motion for a new trial. On an application by the defendants for security for the costs of the motion:—

Held, that as the motion was a step in the litigation not contemplated when the amount of the security was originally fixed, the proper course was to apply at chambers to increase the amount of the security ordered to be given, and that an appeal from any order made on such an application would lie to the Court of Appeal.

APPLICATION by the defendants for security for the costs of a motion for a new trial of which the plaintiff had given notice.

The plaintiff was a foreigner resident abroad, and having no property within the jurisdiction of the Court. Under an order made at chambers he gave security for the costs of the action. The action was tried and a verdict passed for the defendants. The plaintiff gave notice of motion for a new trial, and the defendants then made this application.

Carver, for the defendants.

Hodges, for the plaintiff.

LORD ESHER, M.R. In this case the action is brought against a subject of the Queen in this country by a foreigner resident abroad, who has no property in this country. On the application of the defendants an order was made for security for costs, and the amount was fixed. The trial resulted in a verdict for the defendants; and the plaintiff is desirous of taking a further step in the litigation which could hardly have been contemplated when the amount of the security was fixed. Under these circumstances the defendants ask for security for the costs of the motion in this Court of which notice has been given, and the question is raised as to what should be the practice in such a case.

This Court in exercising the jurisdiction as to new trials is

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exercising the jurisdiction which was formerly vested in the Queen's Bench and the Queen's Bench Division. This was not contemplated when the rules and orders were made, and those which apply to security for costs in this Court were made with respect to its sitting as a Court of Appeal, and not to the jurisdiction now exercised in such a case as the present.

In the case of a foreigner who asked an English Court to exercise jurisdiction in his case the practice was that the amount of the security required from him was fixed by a master at chambers. The Court certainly had jurisdiction in the matter, without such a previous application at chambers, but the practice was as I have stated it. If afterwards some new step in the litigation was taken which was not contemplated at the time the amount of the security was fixed, the practice was to go to chambers to ask that the amount of the security should be increased. I have little doubt that a motion for a new trial would have been treated as a matter not originally contemplated, and that in such a case an increase of the security would have been ordered.

A motion for a new trial is now made in this Court, and we are to exercise all jurisdiction connected therewith as nearly as possible as it was exercised by the Queen's Bench Division. Under these circumstances, we think such an application as this should be made in chambers. An appeal against an order for further security made at chambers would, I should imagine, only succeed under very exceptional circumstances; but such an appeal might no doubt have been formerly made to the Queen's Bench Division, and may now be made to this Court.

On this occasion we do not think it right to send the case to chambers for decision, and we shall exercise our jurisdiction without taking that course, though it must be understood that the practice is as now laid down—that such applications as the present should be made at chambers.

BOWEN and KAY, L.JJ., concurred.

Order for security.

Solicitors for plaintiff: *Irvine, Hodges & Co.*

Solicitors for defendants: *Wynne, Holmes & Wynne, for Simpson, North & Co., Liverpool.*

A. M.

THE QUEEN *v.* THE JUDGE OF THE BROMPTON COUNTY COURT AND VAGUE.

1893
Feb. 9, 10;
May 19.

Solicitor—Unqualified Person—Power of County Court Judge to Commit for Contempt Unqualified Person acting as Solicitor—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 2, 35, 36—*Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 26—*County Courts Act*, 1846 (9 & 10 *Vict. c.* 95), *s.* 113—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 162.

A county court judge has no jurisdiction under s. 26 of the Solicitors Act, 1860, to commit for contempt a person who has acted as a solicitor in an action in the county court without being qualified.

ORDER NISI for a mandamus to the judge of the Brompton County Court to hear and determine an application by the Incorporated Law Society for the committal to prison of one John Alfred Vague, under 23 & 24 Vict. c. 127, s. 26, for contempt of Court in having acted as a solicitor in an action in the said county court contrary to 6 & 7 Vict. c. 73, s. 2, without being duly qualified. (1)

(1) By the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 2: "No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding . . . . or act as an attorney or solicitor in any cause, matter, or suit . . . . unless such person shall . . . . be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor . . . ."

By the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 26: "Every person who acts as an attorney or solicitor contrary to the enactment in s. 2 of the first hereinbefore-mentioned Act" (6 & 7 Vict. c. 73) . . . . "shall be deemed guilty of a contempt of the court in which the action, suit, cause, matter, or proceeding in relation to which he so acts is brought, had, or taken, and may be punished accordingly . . . ."

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 162: "If any person shall wilfully insult the judge or any juror or witness, or any registrar, bailiff, or officer of the court, for the time being during his sitting or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the Court, or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge to take such offender into custody and detain him until the rising of the Court, and the judge shall be empowered if he shall think fit by a warrant under his hand and sealed with the seal of the Court, to commit any such offender to any prison to which he has power to commit offenders for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding 5*l.* for every such offence,

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On the application being made, the county court judge refused to hear the motion on the ground that he had no jurisdiction to commit for a contempt which had not occurred in the face of the Court, and dismissed the application without hearing the evidence contained in the affidavits filed in support of the motion.

The Attorney General (*Sir Charles Russell, Q.C.*), and *Sutton*, for the county court judge, shewed cause against the order. The county court judge had no jurisdiction to entertain the application. The only power which a county court judge has of committing for contempt is given by s. 162 of the County Courts Act, 1888. That section is a re-enactment of s. 113 of the County Courts Act, 1846, under which it has been held that the jurisdiction of the judge of a county court to commit for contempt is confined to contempt committed in the face of the Court: *Reg.* v. *Lefroy* (1); *Reg.* v. *Jordan.* (2) No doubt s. 26 of the Solicitors Act, 1860, says that an unqualified person acting as a solicitor is guilty of a contempt of the Court in which he so acts, and may be punished accordingly; but now a county court is, by 52 & 53 Vict. c. 63, s. 6, a court under the County Courts Act, 1888, and the only power which a judge of a county court has under that Act of dealing with contempt is contained in s. 162. Contempt of Court might always be punished by indictment (3), and therefore s. 26 of the Solicitors Act, 1860, has force, although the county court judge cannot deal summarily with the contempt of Court which it creates.

Sir R. E. Webster, Q.C., Crump, Q.C., and *Hollams*, in support of the order. The county court judge had jurisdiction to entertain the application. By ss. 35 and 36 of the Solicitors Act, 1843, an unqualified person acting as a solicitor in any action was guilty of a contempt of the Court in which such action was brought—including in express terms the county court—and might be punished accordingly. The county court had no statutory power to commit for contempt of Court until it was

and in default of payment thereof, to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid."

(1) Law Rep. 8 Q. B. 134.

(2) 36 W. R. 589, 797.

(3) See Hawkins' P. C. c. 25, s. 4.

given by s. 113 of the County Courts Act, 1846. The county court in 1843 must therefore have had power to punish for contempt apart from the limited power to commit for contempt subsequently conferred upon county courts by the Act of 1846. The legislature intended by ss. 35 and 36 of the Solicitors Act, 1843, to give the county court a summary power to commit an unqualified person practising before it, and although those sections are now repealed, they have been practically re-enacted by s. 26 of the Solicitors Act, 1860. The power of the county court, therefore, to punish an unqualified person by committing him to prison still exists, and is unaffected by the fact that the County Court Acts have given to the county court a limited power of committal for contempt committed in the face of the Court. Such a power is convenient, and would not be abused.

[They referred to *Rex* v. *Clement* (1); *Ex parte Pater* (2); *Sparks* v. *Martyn.* (3)]

Cur. adv. vult.

May 19. The judgment of the Court (Lord Coleridge C.J., and Cave, J.) was read by

CAVE, J. The question in this case is whether a county court judge has power to deal summarily with the contempt of Court created by the 26th section of the Solicitors Act, 1860. In order to answer this question the best plan is to follow the course pursued by Sir R. Webster in his ingenious argument, and take a chronological view of the legislation on the subject. The first enactment which deals with the question is the Solicitors Act of 1843, which enacts (s. 35):—

"That from and after the passing of this Act, in case any person shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit or any proceedings in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court

(1) 4 B. & A. 218. (2) 5 B. & S. 299.
(3) 1 Ventr. 1.

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Cave, J.

of law or equity for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the Court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly." And (s. 36) that: "In case any person shall commence or defend any action or sue out any writ, process, or summons, or carry on any proceedings in the court commonly called the county court holden in any county in that part of Great Britain called England and Wales, who is not or shall not then be legally admitted an attorney or solicitor according to this Act, or shall not himself be plaintiff or defendant in such proceeding respectively, such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursement on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the Court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly." No new jurisdiction in one sense is hereby given to the county court; but a new subject-matter is brought within the range of an old jurisdiction. The elliptical expression, "shall and may be punished accordingly," means, when extended, "shall and may be punished as if it were a contempt of Court." Now, the county court there referred to is the ancient county court. The contempt of Court, therefore, created by the 6 & 7 Vict. c. 73, s. 36, was punishable by indictment. Possibly, though it is not necessary to decide this point, and we should not like to give an opinion without further consideration, it was also punishable summarily by the judge of the Court. The ancient county court is, however, extinct; and the present question arises, not with respect to that court, but to the new county courts constituted by the Act of 1846. In *Reg.* v. *Lefroy* (1), it was decided that the county court, although an inferior Court of record (2), had no power to commit for contempt, except in the cases specially

(1) Law Rep. 8 Q. B. 134. (2) See 9 & 10 Vict. c. 95, s. 3.

provided for by s. 113 of the 9 & 10 Vict. c. 95, now re-enacted by s. 162 of the Act of 1888. Sects. 35 and 36 of the Solicitors Act of 1843 have been repealed, and by s. 26 of the Solicitors Act, 1860, it is enacted that: "Every person who acts as an attorney or solicitor contrary to the enactment in s. 2 of the first hereinbefore-mentioned Act, or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate or the Court for Divorce and Matrimonial Causes, without being duly qualified so to act, shall be deemed guilty of a contempt of the Court in which the action, suit, cause, matter or proceeding in relation to which he so acts is brought, had, or taken, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done or any disbursement made by him in the course of so acting, and shall, in addition to any other penalty or forfeiture and to any disability to which he may be subject, forfeit and pay for every such offence the sum of 50*l.*, to be recovered, with full costs of suit, by action brought with the sanction of her Majesty's Attorney General in the name of the Incorporated Law Society in any of the Superior Courts of Law at Westminster or in any county court; and such penalty shall be applied in like manner as fines imposed for practising without a stamped certificate are now by law applicable."

This enactment, however, only leaves the matter where it stood before. It simply provides that any person who does certain things shall be deemed guilty of a contempt of the Court, &c., "and may be punished accordingly"—i.e., as if he were guilty of such contempt. In our judgment, such contempt, although punishable by indictment, is not now and never has been punishable summarily in the county court, and the reasoning in *Reg.* v. *Lefroy* (1) applies to and governs this case. The case, in fact, stands thus: in 1846 the legislature constituted new Courts in the place of the ancient county court, and declared such Courts to be Courts of record. Under these circumstances, it became necessary to decide as a matter of policy whether these Courts should or should not have the power ordinarily incident to

(1) Law Rep. 8 Q. B. 134.

1893

THE QUEEN v. JUDGE OF THE BROMPTON COUNTY COURT.

Cave, J.

inferior Courts of record of punishing by fine and imprisonment, at the discretion of the judge, contempt committed in the face of the Court. The legislature decided, as was held in *Reg.* v. *Lefroy* (1), that it would not entrust such a general and unlimited power to the county court judges, but gave them, instead, a special jurisdiction to punish by a limited fine or by imprisonment of limited duration certain specified offences, all of which were of the nature of contempts of Court. Then came the Solicitors Act of 1860, which provided that certain acts therein specified should be deemed to be contempts of Court, and should be punished as if they were such. Contempt of a county court, unless it was one of the acts specified by the legislature to which a limited fine or imprisonment for a limited period was appropriated, was punishable by indictment, but not summarily. The enactment of 1860 has a perfectly legitimate interpretation, if it is taken to mean that such acts committed in a county court shall be punishable by indictment. How then can it be necessary or even permissible to construe it as giving to a county court judge, in the case of the acts forbidden by s. 26, a general indefinite power to fine and imprison, which the legislature had in 1846 expressly determined it was not advisable that a county court judge should possess? The argument against assuming such a power to be given is strengthened by the fact that the legislature has in the 26th section of the Act of 1860 imposed on the offender a limited penalty of 50*l.* It was argued by Sir R. Webster that it was convenient that the county court judge should have power to deal summarily with these cases, and that it would be often sufficient to order the offender to pay the costs of the proceedings. But the power of the county court judge, if it exists at all, cannot stop there. The argument from convenience is one for the legislature and not for the judges; and in favour of the liberty of the subject we ought not to hold that an indefinite power to fine or imprison without appeal has been given to the county court judges unless it is quite clear that the legislature has so intended. We are of opinion that the legislature has not so intended, and that the learned county court judge was perfectly right in refusing to exercise a jurisdiction

(1) Law Rep. 8 Q. B. 134.

which had never been conferred upon him. The order must be discharged with costs.

Order discharged.

Solicitor for the county court judge: *Solicitor to the Treasury.*
Solicitor for the Incorporated Law Society: *E. W. Williamson.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.

1893

June 26.

IN RE STUART. EX PARTE CATHCART.

Solicitor—Agreement for Remuneration—Reasonableness of Amount payable under Agreement—Attorneys' and Solicitors' Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 8, 9.

A solicitor was employed by the defendant in lunacy proceedings to attend the taxation of the petitioner's costs which she had been ordered to pay, and it was agreed that the solicitor should be paid 5 per cent. on the amount taxed off the bill of costs. The bill of costs contained items for daily refreshers to counsel far exceeding the maximum amount per diem allowed by the rules, and of the whole bill of 5000*l.* nearly 2000*l.* was taxed off, the principal part of which consisted of such refreshers. On an application under the Attorneys' and Solicitors' Act, 1870, by the defendant to set aside the agreement as unfair and unreasonable:—

Held (affirming the judgment of the Queen's Bench Division), that such an agreement must not only be fair in the sense that it was understood by the client, but must be reasonable in amount, having regard to the work done, and that the agreement was unreasonable in this respect, and must be set aside.

APPEAL from an order of the Divisional Court (Wills and Charles, JJ.) affirming an order of Mathew, J., at chambers, setting aside an agreement for the remuneration of a solicitor.

In certain proceedings in lunacy initiated against Mrs. Mary Cathcart by her husband, she was ordered by the Court to pay two-thirds of the taxed costs of the petitioner (see *In re Cathcart* (1)). She employed Mr. R. H. Stuart, a solicitor, to attend at the taxation of the costs of Messrs. Crawley & Co., the petitioner's solicitors, and signed an agreement in the following terms: "I agree to pay you five per cent. on all costs taxed off Messrs. Crawley & Co.'s bill." The solicitor agreed to and signed this agreement. The bill taken in by Messrs. Crawley &

(1) [1893] 1 Ch. 466.

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Co. amounted to about 5000*l.*, and of this nearly 2000*l.* was taxed off. The greater part of the amount taxed off consisted of a disallowance of refreshers to counsel for the fourteen days during which the hearing of the petition lasted, the amount paid in respect of such refreshers being largely in excess of the maximum amount of ten guineas a day allowed by the rules. The agreement was examined and allowed by a taxing master under s. 4 of the Attorneys' and Solicitors' Act, 1870, and Mrs. Cathcart then applied to a judge at chambers under ss. 8 and 9 of the Act to set aside the agreement (1), and obtained an order to that effect, which was affirmed by the Divisional Court.

The solicitor appealed.

Winch, Q.C., and *Stephen Lynch*, in support of the appeal. The matter has been before a master under s. 4 of the Act, and

(1) The Attorneys' and Solicitors' Act, 1870 (33 & 34 Vict. c. 28), s. 8: "No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements in respect of which the agreement is made, by the Court in which the business, or any part thereof, was done, or a judge thereof, or if the business was not done in any court, then where the amount payable under the agreement exceeds fifty pounds, by any superior Court of Law or Equity or a judge thereof, and where such amount does not exceed fifty pounds, by the judge of a county court which would have jurisdiction in an action upon the agreement."

Sect. 9: "Upon any such motion or petition as aforesaid, if it shall appear to the Court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such Court or judge by rule or order in such manner and subject to such conditions, if any, as to the costs of such motion or petition as such Court or judge may think fit; but if the terms of such agreement shall not be deemed by the Court or judge to be fair and reasonable, the same may be declared void, and the Court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges, and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner and according to the same rules as if such agreement had not been made; and the Court or judge may also make such order as to the costs of and relating to such motion or petition, and the proceedings thereon, as to the said Court or judge may seem fit."

the agreement has been pronounced to be fair and reasonable. The Court will therefore treat it as res judicata; for otherwise, supposing the matter had been referred by the master, there might be a decision of the Court under s. 4, and a conflicting decision under ss. 8 and 9. If the question is now open the Court will look to the circumstances existing when the agreement was made to see if it was fair and reasonable. The solicitor could not know that a bill would be brought in giving the amounts paid for refreshers regardless of the fact that they were in excess of the amounts allowed by the rules. The client fully understood the agreement, and indeed proposed it herself and insisted on it, and though the agreement is favourable to the solicitor, that result could not have been anticipated. [They cited *In re Attorneys' and Solicitors' Act*, 1870. (1)]

Bigham, Q.C., and *Cluer*, contrà. Sect. 4 has nothing to do with this application, which is one to the Court under ss. 8 and 9 asking the Court to determine whether the agreement is fair and reasonable.

It is doubtful whether the application was rightly made to the master under s. 4, because the agreement was not in respect of work to be done in any action of law or suit in equity; but, assuming it to have been rightly made, the master did not refer the matter, but decided it himself. If it had been referred and decided by the Court, but not otherwise, it might have been treated as res judicata. The Court has to determine under under ss. 8 and 9 whether the agreement was fair and reasonable, and to arrive at a conclusion they must consider not only the manner in which it was entered into, but its terms. If the latter are exorbitant the agreement cannot be called a reasonable one for a solicitor to make with his client; and in this case the amount he would receive would be nearly five times the ordinary remuneration for the work he had to do. [They cited *Baker* v. *Oakes* (2), and *In re Thomas*. (3)]

LORD ESHER, M.R. In this case an application was made on behalf of Mrs. Cathcart for an order declaring that an

(1) 1 Ch. D. 573. (2) 2 Q. B. D. 171.
(3) [1893] 1 Q. B. 670.

C. A. 1893

IN RE STUART. EX PARTE CATHCART.

Lord Esher, M.R.

agreement which she had entered into with a solicitor as to costs should be set aside, and that his costs should be taxed in the ordinary way. That application was made by summons at chambers, and whether it ought to have been made by motion to the Court is now immaterial, because the matter has been before the Divisional Court, from which it now comes to us by way of appeal.

The subject-matter of the appeal is an agreement between a solicitor and a person who was desirous of becoming his client as to the terms on which he would act, and the relation of solicitor and client would arise directly an agreement was arrived at. The work to be done was to tax the bill of costs of a solicitor employed by the lady's husband, a part of which she was to pay by order of the Court. The arrangement was made before the bill was seen, and was that the solicitor should receive 5 per cent. on the amount to be taxed off the bill. It is said that agreement is void, and one reason which has been given is, that it is against public policy, as bearing a resemblance to champerty, and I am not prepared to say that it is not so. Another ground was that the solicitor did not explain to the full extent the liability which the lady was incurring. If it is void on either of these general grounds, that does not affect the other ground brought forward, that it is void under ss. 8 and 9 of the Attorneys' and Solicitors' Act, 1870. The case for our consideration does not arise under s. 4 under which the taxing officer may require the opinion of the Court to be taken whether the agreement is fair and reasonable, but comes within ss. 8 and 9, relating to the examination and enforcement of agreements and the setting aside of improper ones. Assuming this agreement not to be void as against public policy or on the ground that its effect was not fully explained by the solicitor, what is its position under these sections? By s. 9 the Court may enforce an agreement if it appears that it is in all respects fair and reasonable. With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness. But the agreement

must also be reasonable, and in determining whether it is so the matters covered by the expression "fair" cannot be re-introduced. As to this part of the requirements of the statute, I am of opinion that the meaning is that when an agreement is challenged the solicitor must not only satisfy the Court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the Court that the terms of that agreement are reasonable. If in the opinion of the Court they are not reasonable, having regard to the kind of work which the solicitor has to do under the agreement, the Court are bound to say that the solicitor, as an officer of the Court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner. On this question it is quite clear to me that we cannot arrive at any other conclusion than that arrived at by the Divisional Court. It is impossible to say that work which according to information given by the taxing master to the Divisional Court would be properly remunerated by a sum of 20*l.* can be reasonably charged at nearly 100*l.* The decision of the Court below must be affirmed, and the appeal dismissed.

BOWEN, L.J. I agree.

KAY, L.J. I agree.

Appeal dismissed.

Solicitor for appellant: *R. A. Stuart.*
Solicitor for respondent: *A. F. Fenton.*

A. M.

C. A.
1893
June 16, 20.

[IN THE COURT OF APPEAL.]

CHAMBERLAIN *v.* YOUNG AND TOWER.

Bill of Exchange—Validity—Bill made payable to "—— order"—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 3, 5, 7, 55.

By the Bills of Exchange Act, 1882, s. 3: "A bill of exchange is an unconditional order in writing addressed by one person to another . . . . requiring the person to whom it is addressed to pay . . . . a sum certain in money to or to the order of a specified person, or to bearer," and "an instrument which does not comply with these conditions . . . . is not a bill of exchange."

By s. 5: "A bill may be drawn payable to, or to the order of, the drawer."

By s. 7: "Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty":—

Held, that an instrument which was made payable to "—— order," the blank never having been filled in, must be construed as meaning that it was payable to "my order"—that is, to the order of the drawer, and that, having been indorsed by him, it was a valid bill of exchange.

APPLICATION by the plaintiff for a new trial of the action, or that judgment might be entered for him.

The action was brought by the plaintiff as the indorsee for value, against the defendant Tower as the drawer and indorser, of a bill of exchange. The defendant Young, who was the acceptor, had become bankrupt.

At the trial before Lawrance, J., and a jury, it appeared that the bill bore date May 18, 1892, and the material part of it was as follows:—

"Five months after date pay to —— order the sum of one hundred and fifty pounds for value received.

(Signed) "E. Malcolm Tower."

"To Mr. A. J. Young."

The bill was accepted by Young, and was indorsed by Tower, and by him handed to the plaintiff for value. It was duly stamped as a bill of exchange. The blank had never been filled in.

For the defence it was objected that the document was, neither at common law nor under the Bills of Exchange Act, 1882, a bill of exchange, and that, consequently, an action could not be

maintained upon it as such. (1) The learned judge decided the point of law in favour of the defendant.

The plaintiff applied for a new trial or judgment.

Crump, Q.C., and *Lewis Thomas*, for the plaintiff. If there is any irregularity in the form of the bill, the defendant Tower, having indorsed the bill, is by s. 55, sub-s. 2 (*c*) (2) of the Bills of Exchange Act, 1882, estopped from denying its validity.

Firminger, (*Jelf, Q.C.*, with him), for the defendant Tower. The document does not satisfy the requirements of s. 3, sub-s. 1, and s. 7, sub-s. 1, and therefore by s. 3, sub-s. 2, it is not a bill of exchange, and the action cannot be maintained. Sect. 55, sub-s. 2 (*c*), creates an estoppel only in the case of a document which is a bill of exchange within the meaning of the Act, and this document is not a bill of exchange, for no one is specified in it as payee, and it is not made payable to bearer. At any rate, it could not become a bill of exchange until the drawer had indorsed it. The holder might have filled up the blank: Byles on Bills, 15th ed. pp. 92, 337. It was not a bill of exchange because the blank was not filled up, and there was no cause of action at the time when the writ was issued: Story on Bills, p. 68; *McCall* v. *Taylor* (3); *Rex* v. *Randall*. (4)

(1) The defendant also pleaded that there was fraud in the negotiation of the bill, and that the plaintiff took the bill with knowledge of the fraud. The jury, upon this defence, found a verdict for the defendant.

(2) By s. 3: "(1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

"(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange."

By s. 5: "(1.) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee."

By s. 7: "(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty."

By s. 55: "(2.) The indorser of a bill by indorsing it—

"(*c*.) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

(3) 34 L. J. (C.P.) 365.

(4) Russ. & Ry. (C.C.) 195.

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[LORD ESHER, M.R., referred to *Carter* v. *White*. (1)]

That was not an action upon a bill of exchange. Independently of s. 55, sub-s. 2 (*c*), there is no estoppel at common law. The defendant only represented the document to be a bill of exchange subject to the filling in of the blank: *Atwood* v. *Griffin*. (2) In *Phillips* v. *Im Thurn* (3), there was an express representation that the instrument was a negotiable bill.

Crump, Q.C., in reply. The bill is made payable to "—— order," not to "—— or order." It means "pay to the order of the drawer," and it is indorsed by the drawer. It is a perfectly good bill of exchange.

Cur. adv. vult.

June 20. LORD ESHER, M.R. [His Lordship stated that the Court were of opinion that there ought to be a new trial of the question of fraud in the negotiation of the bill, and continued:—]

With regard to the point of law, it is obvious that, if this paper is not a bill of exchange at all, it would be useless to send the case down for a new trial, because, even though there were no fraud, the defendant would not be liable on the paper as a bill. This question must be considered upon the assumption that there has been no fraud on the part of the plaintiff. The question raised is this: It is said that Tower, having put his name to this piece of paper, which looks as like a bill of exchange as can well be, having put his name to it where the drawer of a bill of exchange would put his name—having indorsed it as if it were a bill of exchange, the document bearing a bill stamp—having handed it to the plaintiff as a bill of exchange, and obtained money from the plaintiff for it—it is said that the defendant Tower is not liable upon it, because it is not a bill of exchange, there not being in it the name of any payee. It is said that this is so according to the mercantile law, and that, even if it is not, still the document does not fulfil the conditions which are mentioned in s. 3 of the Bills of Exchange Act, 1882, as necessary to a bill of exchange, and, therefore,

(1) 20 Ch. D. 225. (2) 2 C. & P. 368; Ry. & Mood. 425.
(3) Law Rep. 1 C. P. 463.

the document cannot be treated as a bill of exchange. On the other side, s. 55 of the Act was relied on as estopping the defendant as indorser from denying the validity of the bill.

With regard to the proposition that a business man can put his name upon such a piece of paper stamped as a bill of exchange, that he can put his name on it as the drawer of a bill of exchange, indorse it as a bill of exchange, hand it over for value as a bill of exchange, so that (unless he intended at the time to take the objection which is now taken) he must have meant it to be circulated as a bill of exchange, and that then by the mercantile law the instrument is invalid as a bill of exchange because of the mere absence of the name of a payee (a defect which is not of the smallest practical consequence under the circumstances), this is a proposition to which it must not be taken that I give the slightest assent, although it is not necessary in the present case to express any judicial opinion on the point, and, therefore, we think it is wiser not to determine the point judicially. But, as at present advised, the proposition appears to me to be contrary to the most ordinary morality of mercantile transactions. It is not, however, necessary to determine the point, because Kay, L.J., on reading the bill, called our attention to the form of it, and thus shewed us that the bill is a perfect bill in every respect because it says "Pay to —— order," not "Pay to —— or order." In other words, it says, "Pay to order," and by the most common rules of construction that must mean "Pay to my order." If so, it is a perfect bill of exchange. The payee is clearly indicated by the direction "Pay to my order" —that is, pay to the order of the drawer. I have said what I have said only in order to guard myself against its being supposed that I assent to the argument which has been addressed to us, though we give no judicial decision upon the point. This is a simple bill of exchange. There is no blemish in it, and the only question on the new trial will be whether the charge of fraud is established.

BOWEN, L.J. With regard to the question whether this document is a bill of exchange, if we could have seen our way to hold that it is not a bill, there would have been an end of the

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plaintiff's case, and there need not have been a new trial. But, on looking carefully at the document, it is clear that it is a good bill. The case was argued for some time on the assumption that the direction was to "Pay to —— or order," and as if no name of a payee had been inserted. But in fact the document is not drawn in that form. It directs payment to be made "to —— order," and it is signed by Tower, so that the name of the payee is not omitted. The bill in its present form in effect directs payment "to my order," and this is a form of bill which is perfectly well known to the law, and perfectly consistent with its being a negotiable instrument from the moment when it was issued.

With regard to the question whether, if it had been in the form "Pay to —— or order," at the time when Tower indorsed it, and at the time when Young accepted it, there would have been an estoppel preventing the plaintiff from saying that it was a valid bill, I prefer not to express any opinion now. That there would under such circumstances be an estoppel of some sort is clear, but whether it would go to the length of estopping the acceptor and the indorser respectively from saying that the document was a bill of exchange at the time when it was issued, or whether it would only prevent them from denying that it was issued with an authority from them to fill up the blank, and preclude them after the blank had been filled up from denying that what was merely an inchoate bill, until the blank had been filled up, had matured into a bill immediately the blank was filled up, is, I think, a matter of some nicety. An authority to fill up the blank is certainly conferred upon the holder of such an inchoate bill by the form in which it is issued, and that authority would not be determined by the death of the acceptor, but would continue afterwards. There would, therefore, be some contract with the holder, which must, I think, be referred to the law of estoppel, and it may be that the estoppel merely prevents the drawer and the acceptor from denying that, when the blank has been filled up, the document will become from that time forward a bill of exchange to all intents and purposes.

But it is not necessary to pronounce any opinion upon that point now, for it is clear upon the construction of the document

itself that it was a valid bill of exchange from its earliest inception. For the same reason it is not necessary now to decide the question which has been raised upon sub-s. 2 (*c*) of s. 55, viz., whether it applies to anything except that which is a bill of exchange within the definition contained in s. 3 of the Act.

KAY, L.J. Upon the question whether the defendant is estopped by s. 55 of the Act or otherwise from denying that the document is a valid bill of exchange, I express no opinion, because I think it does not really arise in this case. Upon looking at the document it appears that a blank is left just before the word "order." The word "or" does not precede the word "order," and therefore the document runs, "pay to order." It is signed by the drawer, and he is the first indorser, and it is plain that every one who had anything to do with the document treated it as a bill of exchange payable to the order of the drawer. That such a document is a good bill of exchange has not been denied. We asked in the course of the argument for some authority that a bill payable to the order of the drawer is not a good bill of exchange, and no such authority was produced. And I find that as long ago as 1791, Eyre, C.B., in *Gibson* v. *Minet* (1), said: "Bills of exchange being of several kinds, the title to sue upon any one bill of exchange in particular will depend upon what kind of bill it is, and whether the holder claims title to it as the original payee, or as deriving from the original payee, or from the drawer in the case of a bill drawn payable to the drawer's own order, who is in the nature of an original payee." I think that this was a good bill of exchange, the meaning of it being, "Pay to the order of the drawer," and that every one always regarded it in that light. The objection that it was not a bill of exchange therefore fails entirely, and that is the only point we have now to decide, except that, there not having been a satisfactory trial of the question of fraud, that question must go back for a new trial.

Application for new trial granted.

Solicitors: *Aird & Hood*; *Sawyer & Ellis.*

(1) 1 H. Bl. at p. 605.

W. L. C.

C. A.
1893
June 9.

[IN THE COURT OF APPEAL.]

LISTER *v.* LANE & NESHAM.

Landlord and Tenant—Covenant by Lessee to "repair, uphold, and maintain" Demised Premises—Inherent Defect in Premises.

The plaintiffs granted to the defendants a lease of a house in Lambeth, containing a covenant by the lessees that they would "when and where and as often as occasion shall require, well, sufficiently, and substantially, repair, uphold, sustain, maintain, amend and keep" the demised premises, and the same "so well and substantially repaired, upheld, sustained, maintained, amended and kept," at the end of the term yield up to the lessors. Before the end of the term one of the walls of the house was bulging out, and after the end of the term the house was condemned by the district surveyor as a dangerous structure and was pulled down. The plaintiffs sought to recover from the defendants the cost of rebuilding the house. The evidence shewed that the foundation of the house was a timber platform, which rested on a boggy or muddy soil. The bulging of the wall was caused by the rotting of the timber. The house was at least 100 years old, and possibly much older. The solid gravel was seventeen feet below the surface of the mud. There was evidence that the wall might have been repaired during the term by means of underpinning:—

Held, that the defect having been caused by the natural operation of time and the elements upon a house the original construction of which was faulty, the defendants were not under their covenant liable to make it good.

APPEAL by the plaintiffs against the judgment of Grantham, J., at the trial of the action, for the defendant Nesham.

The action was by lessors against their lessees, the defendants Lane & Nesham, to recover damages for alleged breach of a covenant contained in the lease to repair the demised premises. The defendant Lane died after he had delivered a defence, and the action proceeded against the defendant Nesham alone.

The lease was dated November 22, 1883, and by it the plaintiffs demised to the defendants Lane & Nesham a wharf at Lambeth, known as the Shot Tower Wharf, and also the building known as the Shot Tower and a warehouse, and also a messuage (called the Cottage), stables, sheds, &c., adjoining, to hold unto Lane & Nesham, their executors, administrators, and assigns, for the term of seven years from September 29, 1883, at the yearly rent of 800*l*. There was a joint and several covenant by the lessees with lessors, that the lessees would at their own costs and charges

"when and where, and as often as occasion shall require, well, sufficiently and substantially repair, uphold, sustain, maintain, glaze, pave . . . . amend and keep all and singular the said wharf, Shot Tower, warehouse, messuage, buildings and premises . . . . and all the walls, pavements, &c., to the said premises belonging or in anywise appertaining . . . . and the said wharf, Shot Tower, warehouse, messuage, buildings, and premises . . . . , so well and substantially repaired, upheld, supported, sustained, maintained, glazed . . . . amended, and kept, at the end or other sooner determination of the said term hereby granted, will peaceably and quietly leave, surrender and yield up" unto the lessors in such good and substantial state and condition as the lessors "may be bound to deliver up the same premises to the superior landlord or landlords thereof at the expiration of the lease under which they now hold the premises."

The defendants entered into possession of the demised premises under this lease, and they remained in possession until the end of the term in September, 1890. In August, 1890, the plaintiffs delivered to the defendants a notice, signed by the plaintiffs' surveyor, to execute certain repairs to the premises according to particulars delivered with the notice. The plaintiffs by their statement of claim alleged that "the defendants did not, pursuant to the said notice, do the said repairs. In consequence of the said breaches of covenant by the defendants part of the said demised buildings became dangerous and had to be pulled down, and the plaintiffs suffered great loss and damage to their reversion."

The plaintiffs claimed 700*l.*, the principal item in which was a sum of 569*l.* for "rebuilding dwelling-house," meaning the Cottage.

The defendant Nesham by his defence said that the notice to repair "required work to be done which the defendant was not bound to do by the terms of the covenant to repair in the said lease contained. The premises were repaired and were delivered up in repair in accordance with the said covenant. After the determination of the said lease part of the demised buildings were pulled down, but not by order of the defendants, nor in consequence of their act or default."

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At the trial Mr. Douglas, the plaintiffs' surveyor, was examined. He said that in 1887 the premises were in bad condition. He called the attention of the defendant Nesham to the want of repair. In August, 1890, he again inspected the premises. The south wall of the Cottage was bulged, and the floors were five inches out of level. The witness prepared the notice which was served in August, 1890. The repairs were commenced, and all was done but the wall. He said that the wall could have been rebuilt without any difficulty in 1887, and if the pointing of the wall had been done and the wall had been underpinned, no difficulty would have arisen. The wall had pitched more towards the east in 1890. In August, 1890, he gave notice to pull down or repair the wall. It might be that it would have involved the pulling down of the house. He estimated the cost of putting right the Cottage at 513*l*. From what he had seen since he did not believe it was possible to have pulled down the wall without pulling down the house.

Mr. Truscott, a builder, stated that he was employed by the defendants to do work to the premises, and from 1889 to June, 1891, he was continuously doing something. He put up scaffolding to point the wall in September, 1891, intending to pull down part of the wall and rebuild. He gave notice to the district surveyor, who examined the house and condemned it as a dangerous structure. "In the foundations of the building I found a mud cill. It was used instead of concrete foundation, and it had rotted. I think it would cost 530*l*. to put the Cottage back." A "mud cill" was explained as meaning a timber platform, which rested on a boggy soil and on which the Cottage was built. In cross-examination the witness said: "The Cottage was a very old building indeed, at least 100 years. I cannot say if it was 200 years old. No one knew of the foundation. It could have been underpinned."

Mr. Hewitt, the district surveyor, deposed that in November, 1891, the Cottage was in a dangerous condition. He came to the conclusion that it was a bad foundation. "I think it had been falling over ever since it was built. I think the cause of bulging was the sinking of the foundation. I think the decay would be gradual, and it would get worse from 1890 to 1891. I

do not think it would have been profitable to repair it without pulling it down. The soil is very boggy, and the gravel is seventeen feet down."

T. Terrell, for the plaintiffs. There was a breach of the defendants' covenant to repair during the lease and at the end of it. The defendants might have underpinned the wall; but the learned judge at the trial held that that would have cost so much that it did not reasonably come within the covenant. No doubt the authorities shew that such a covenant must be construed with regard to the nature and the age of the demised premises. But here the covenant is not only to "repair," but also to "uphold, maintain and keep" the premises. Under a general covenant to repair the tenant is bound to rebuild a house if it is accidentally destroyed by fire: *Bullock* v. *Dommitt.* (1)

The principles applicable to the construction of repairing covenants are shewn by *Payne* v. *Haine* (2); *Easton* v. *Pratt* (3); *Proudfoot* v. *Hart* (4); *Gutteridge* v. *Munyard.* (5)

[BOWEN, L.J., referred to *Soward* v. *Leggatt.* (6)]

McCall, Q.C., and *Stewart-Smith*, for the defendant Nesham, were not heard.

LORD ESHER, M.R. In deciding this case we have to consider by what rules we ought to govern our inquiry. In Smith's Law of Landlord and Tenant, 3rd ed. at p. 302, I think that the result of the cases is properly stated. I do not cite that work as an authority, but only as stating correctly the rule to be deduced from the cases. The learned author says, referring to *Gutteridge* v. *Munyard* (5) and other cases: "These cases establish that, where there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same

(1) 6 T. R. 650.
(2) 16 M. & W. 541.
(3) 2 H. & C. 676.
(4) 25 Q. B. D. 42.
(5) 7 C. & P. 129; 1 Mood. & Rob. 334.
(6) 7 C. & P. 613.

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state as if it were a new one." You have to consider not only what the damage is—what is the amount of repair required—but also whether the covenant has been broken. That I take to be the right rule, and it is derived partly from the summing-up of Tindal, C.J., in *Gutteridge* v. *Munyard* (1), which is always cited on this point. The learned Chief Justice said (2): "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord."

You have then to look at the condition of the house at the time of the demise, and, amongst other things, the nature of the house—what kind of a house it is. If it is a timber house, the lessee is not bound to repair it by making a brick or a stone house. If it is a house built upon wooden piles in soft ground, the lessee is not bound to take them out and to put in concrete piles. That seems to me to be the effect of *Soward* v. *Leggatt* (3), in which Lord Abinger, C.B., said (at p. 617): "The surveyor who has been called on the part of the plaintiff has given you an estimate; but it is also proved that, when the repairs came to be done, they amounted to considerably more than the estimate, and that is generally the case, because, when the work is actually done, improvements are made for which the tenant is not liable, of which the improved mode of laying the joists in the kitchen is an example, and if the joists have been now laid in a manner which will make them more durable and last longer before new ones are again wanted, that is a thing for which the tenant is not liable on the covenant to repair."

Those cases seem to me to shew that, if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However

(1) 1 Mood. & Rob. 334; 7 C. & P. 129. (2) 1 Mood. & Rob. at p. 336.
(3) 7 C. & P. 613.

large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair.

What is the evidence in the present case? The house is an old house built in Lambeth. Lambeth, as we know, was formerly at every unusually high spring tide under water. Therefore, the soil on which this house was built was saturated with water and turned into mud. The high tides in the Thames—that is, the natural elements—made that soil from time to time a boggy and muddy soil, and a shifting soil, for the moment it becomes liquid it shifts like a moss. How did people build at that time upon that muddy soil? They did not go down to the gravel below, but they placed a platform of timber, which, as it were, floated on the muddy soil, in the same way as when the railway went through Chatmoss, the engineer put into the moss as many fagots as possible, and then built the railway on them. So here the builder placed a platform of timber on this muddy soil, and built the house upon it. That is the nature of this house. Whatever happens by natural causes to such a house in course of time—the effects of natural causes upon such a house in the course of time—are "results from time and nature which fall upon the landlord," and they are not a breach of the covenant to repair. They are matters which must be taken into account in considering whether the covenant to repair has been broken, and, when they are the results of time and nature operating on such a house, they are not a breach of the covenant, and the tenant is not bound to do anything with regard to them. That, as it seems to me, is the state of things in this case, and therefore the decision of Grantham, J., was quite right. The tenant from time to time did the proper repairs, and now the plaintiffs want him to do something for which he is not liable, and which would be of no avail unless he built a house of an entirely different kind.

BOWEN, L.J. I agree.

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KAY, L.J. I am of the same opinion. I will add a few words with regard to the law. In construing such a covenant, regard must be had to the character and condition of the demised property, and, assuming that this covenant is, as has been argued, expressed in the largest terms, that it is a covenant to keep in repair and to put in repair, still *Payne* v. *Haine* (1) shews that regard must be had to the character of the house to which the covenant applies. Here the house was built upon a timber structure laid upon mud, the solid gravel being seventeen feet below the timber structure, and the only way in which the effect of time upon the house could be obviated is, according to the surveyor's evidence, by "underpinning" the house. That was the only way to repair it during the tenancy. "Underpinning," as I understand, means digging down through the mud until you reach the solid gravel, and then building up from that to the brickwork of the house. Would that be repairing, or upholding, or maintaining the house? To my mind, it would not; it would be making an entirely new and different house. It might be just as costly to underpin as to pull the house down and rebuild it. No one says, as I judge from the evidence, that you could repair the house by putting in a new timber foundation. The only way, as the surveyor says, to repair it is by this underpinning. That would not be either repairing, or upholding, or maintaining such a house as this was when the lessee took it, and he is not liable under his covenant for damage which accrued from such a radical defect in the original structure. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Venning, Sons, & Mannings; Parson, Lee, & Holmes.*

(1) 16 M. & W. 541.

W. L. C.

[IN THE COURT OF APPEAL.]

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IN RE FLATAU. EX PARTE OFFICIAL RECEIVER.

Bankruptcy—Receiving Order—Rescission—Consent of Petitioning Creditor—Discretion of Court—Bankruptcy Rules, 1890, *r.* 13.

When a receiving order has been made the Court will not, even though the proceedings under it have been stayed, rescind the order merely upon the consent of the petitioning creditor.

The Court has a discretion in the matter, and will not rescind the order without a full investigation of all the circumstances, including the conduct of the debtor.

Ex parte Brigstocke (4 Ch. D. 348), distinguished.

APPEAL by the official receiver against an order made by one of the bankruptcy registrars, rescinding a receiving order which he had previously made against J. A. Flatau.

On January 11, 1893, a bankruptcy petition was presented against Flatau, and it was ordered to be heard on February 3. The hearing was adjourned, and ultimately on February 25 a receiving order was made. The debtor disputed the statement in the petition that the petitioning creditor held no security for his debt, but the registrar decided against him. On the same day, on the application of the debtor, an order was made that all proceedings under the receiving order should be stayed until March 4, 1893, and that, in the event of notice of appeal against the receiving order being lodged on or before March 4, the proceedings thereunder should be further stayed until the appeal should have been heard and determined. The debtor did not present an appeal against the receiving order; but on March 3 he applied to the Court to rescind the receiving order. No notice of the application was served on the official receiver, and no affidavits were filed in support of it. The official receiver was present and objected to the rescission of the order; but the petitioning creditor by his solicitor consented. The registrar made an order rescinding the receiving order, and dismissing the bankruptcy petition without costs.

The ground of the registrar's decision was, that the debtor, on

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applying for the rescission, stated that he had decided not to appeal, and had paid the petitioning creditor's debt and costs. The registrar acted on the authority of *Ex parte Brigstocke* (1), which he considered had decided that, when there was a bonâ fide dispute about the petitioning creditor's debt, and the debtor, when the case was decided against him, offered to pay the debt and costs, the Court might refuse to make a receiving order. The registrar thought that the only difference in the present case was, that, instead of offering to pay before the receiving order was made, the debtor at first preferred to appeal, and then, being no doubt advised that he might lose, offered to abandon the appeal, and to pay the debt and costs, and get the receiving order rescinded. The registrar thought that the present case was the same in principle as *Ex parte Brigstocke* (1), as there was litigation pending as to the propriety of the receiving order being made at all. The case was, therefore, he thought, not within *In re Hester*. (2)

The official receiver appealed.

Sir J. Rigby, S.G., and *Muir Mackenzie*, for the appellant. The requirements of rule 13 (3) of the Bankruptcy Rules, 1890, were not observed. No notice of the application for rescission was served upon the official receiver, and no affidavits were filed in support of it. The application was only mentioned to the official receiver when it was coming on to be heard in Court. Probably the debtor has other creditors; but the official receiver has no means of knowing yet. When once a receiving order has been made the matter is no longer one merely between the debtor and the petitioning creditor. The order enures for the benefit of all the creditors, and the Court will not rescind it without a full inquiry into all the circumstances. Even if all the creditors assent to the rescission of the receiving order, the Court has a discretion in the matter: *In re Hester*. (2) In the

(1) 4 Ch. D. 348.

(2) 22 Q. B. D. 632.

(3) Rule 13: "An application to the Court to rescind a receiving order, or to stay proceedings thereunder, or to annul an adjudication, shall not be heard except upon proof that notice of the intended application, and a copy of the affidavits in support thereof, have been duly served upon the official receiver."

present case the registrar had no materials before him upon which he could properly exercise his discretion.

The Debtor, in person. The petitioning creditor held a security which was more than sufficient to cover his debt, and he did not mention it in his petition.

Lord Esher, M.R. In my opinion the appeal must be allowed. A bankruptcy petition was presented against the debtor by a creditor. When the petition came on for hearing there was a dispute whether the circumstances were such as to authorize the registrar in making a receiving order. He came to the conclusion that the circumstances at that time required that he should make a receiving order, and he accordingly made it. Upon that the debtor said that he would appeal against the making of the receiving order, and thereupon a stay of the proceedings under the order for seven days was granted by the registrar. But the receiving order was made, and the stay of proceedings was to give the debtor an opportunity of appealing against the order. Before the expiration of the seven days the debtor had made up his mind that he could not appeal with any hope of success, and he abandoned his appeal. How, then, did the matter stand? The registrar had made a receiving order, against which there was no appeal. He was functus officio as regards the making of the order. He had given his judgment, and there was the receiving order; and all that could be then done was for the debtor to apply to rescind the order, assuming that it had been rightly made. In making such an application he would be subject to the rule relating to the rescission of a receiving order. Then he went before the registrar with an application to rescind the receiving order, which, as it then stood, was a good and valid order. He did not produce any affidavit, but he satisfied the registrar that he had the consent of the petitioning creditor; and I think the appeal must be decided on the assumption that that fact was proved to the registrar, but that fact alone. He had the consent of the petitioning creditor; he had paid him and satisfied him. But there were, or might be, other creditors, and they were not there, and the circumstances were not known to the registrar. Could the

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registrar properly on that, and that alone, rescind the receiving order, without entering upon a consideration of all the circumstances of the debtor's insolvency—how it came about; what had been the conduct of the debtor when he incurred the debts; what had been his conduct after the debts were incurred, and what was the position of things at the time? All these were things which ought to be considered, if we are of opinion that the order could not be rescinded merely upon the consent of the petitioning creditor.

Now, in *In re Hester* (1) the Court laid down rules of conduct with regard to the rescission of a receiving order, and pointed out that, according to the intention of the Bankruptcy Act, there should be a very full and very careful examination of all the circumstances of the case, not only of the existing state of things, but also of the antecedent conduct of the debtor, before a receiving order is rescinded. It was said in that case that, even where there are many creditors, and all of them agree that the receiving order shall be rescinded, the Court will not act on that consent alone, but will make further inquiries. In that case it was said that all the creditors had consented to the rescission of the receiving order, and that many of them had given receipts in full for their debts. In my judgment (at p. 639) I said: "It is not pretended that he has paid them in full, although it is said that all or most of them have signed receipts in full. If creditors, without getting paid their debts in full, choose to sign a receipt in full, it requires, to my mind, a good deal of explanation how it was that they came to do such an unbusinesslike thing. Such conduct appears to me a badge of folly." That is, in other words, the Court will not allow creditors to commit such an act of folly, and thereby relieve the debtor. Then I said: "The cases are clear that the Court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to" (that is, all the creditors) "is for the benefit of the creditors as a whole," that is, for their benefit, although they have consented. The Court will protect them against their own carelessness and folly, because we know

(1) 22 Q. B. D. 632.

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perfectly well that over and over again the creditors of a debtor are quite willing to write off their debts as bad, to write off the whole thing, and let the debtor begin again, and incur fresh debts. The Bankruptcy Act does not intend that creditors shall commit such folly. I went on to say: "The Court has gone still further, and I think rightly so, and has said, that under the present Bankruptcy Act it will consider, not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality, and to the interests of the public at large, and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger." The meaning of that is, that if the debtor has behaved in an unbusinesslike way, or worse, even although his present creditors may be quite satisfied, and no harm can come to them, yet, if he has so acted in business that it is likely he will do again to other creditors what he has done to his present creditors, the Court will not allow the receiving order to be rescinded. All this has to be considered, even although all the present creditors are fully satisfied, and are entirely indemnified. How can it be right that, on the mere consent of the petitioning creditor, there being other creditors in existence, and the registrar being told nothing about them or about the previous conduct of the debtor, or about the settlement which he has made or is about to make with his creditors, the receiving order should be rescinded? I am certain that the learned registrar will agree to every word that I have said. But he seems to have thought that the case was an exceptional one, and that he could treat it as if the petitioning creditor's debt had been paid before the receiving order was made. I do not think he was entitled to treat the case in that way; but, as there was no appeal against the receiving order which he had made, he, as well as every one else, was bound by it. He was functus officio with regard to the receiving order, and could only entertain the matter as a question of rescission, and then he would be bound by the rules which I have just stated, and must make all the inquiries which I have referred to. I think, therefore, that

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the order rescinding the receiving order cannot be maintained, and that the appeal must be allowed.

LOPES, L.J. I also am of opinion that this appeal must succeed. The registrar seems to have proceeded on the authority of *Ex parte Brigstocke* (1); but the present case is distinguishable from that. In *Ex parte Brigstocke* (1) a tender of the petitioning creditor's debt was made before the adjudication. In this case the payment which is relied on was made after the receiving order. I think the payment here was made too late. There was a good and valid receiving order in existence which could only be got rid of by means of an appeal. The application to the registrar was to rescind the order. The registrar did rescind it; but I think he was wrong in so doing.

The present case seems to me to fall well within the principle of *In re Hester*. (2) In that case all the creditors consented to the rescission of the receiving order, and it was held that, though the consent of all the creditors was an element for the consideration of the Court, it was not in any way conclusive as to the right of the debtor to have the receiving order rescinded. The Court said that all the circumstances of the case ought to be taken into consideration, and that the interests of the general body of creditors and of the public ought to be regarded before the receiving order could be rescinded.

Now, what was done in the present case? The most that was done was to obtain the consent of the petitioning creditor; there was nothing further of any sort or kind. There was no consideration of the circumstances of the case, or of the interests of the general body of creditors. There was not, in my opinion, evidence on which the registrar was entitled to rescind the receiving order.

A. L. SMITH, L.J. I am of the same opinion. In *Ex parte Brigstocke* (1), the receiving order had not been made, and therefore the debtor had not come within the meshes of the bankruptcy law. That is the dividing line. Here, unfortunately for the debtor, he had come within the bankruptcy law, and, in

(1) 4 Ch. D. 348. (2) 22 Q. B. D. 632.

my opinion, for the reasons which have been stated by my brethren, he cannot get rid of the receiving order merely by shewing that he has the consent of the petitioning creditor.

LORD ESHER, M.R. We set aside the rescinding order, and thereupon the receiving order will stand.

Appeal allowed.

Solicitors: *Solicitor to Board of Trade; A. J. Benjamin.*

W. L. C.

WYATT *v.* GEMS.

1893 *June* 26.

Metropolis—Hanging out Articles in front of House—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *s.* 65—*Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 119.

Sect. 65 of 57 Geo. 3, c. xxix. (inter alia), empowers vestries in the metropolis to take summary proceedings against persons hanging out or exposing anything whatsoever from any house over any part of the pavement, or over any area, and refusing to remove such thing when required to do so.

By s. 119 of the Metropolis Management Act, 1855, if any projection or obstruction placed against or in front of any house "shall be an annoyance in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street," the vestry have power to compel its removal:—

Held, that s. 119 of the Metropolis Management Act, 1855, was not inconsistent with, and therefore did not impliedly repeal, the provisions of s. 65 of 57 Geo. 3, c. xxix., relating to the particular offence created by that section.

CASE stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

The respondent Ernest Gems was a basket manufacturer occupying certain premises in Wigmore Street. He displayed various articles of basket-ware, as samples which were not for sale, by fastening them to the front wall of his house above his shop front. The articles so displayed projected about two feet six inches from the house, but did not overhang any portion of the public footway or carriageway, there being an enclosed space in front of the respondent's shop.

The appellant was the district superintendent for the vestry of St. Marylebone, and, pursuant to the powers conferred on the vestry by Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), s. 65,

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he gave the respondent notice to remove such articles of basket-ware from the front of his premises, and on his non-compliance he took out a summons under this section against him.

The magistrate held that 57 Geo. 3, c. xxix., s. 65, had been impliedly repealed by the Metropolis Local Management Act, 1855, and that no offence had been committed, since the articles in question did not extend over the footway or carriageway, and were no inconvenience to the public. He accordingly dismissed the summons, but stated a case for the opinion of the Court. (1)

Poland, Q.C., and *Bodkin*, for the appellant. The magistrate was wrong. The question is of importance, as it is very desirable that there should be power to stop people from hanging articles on the front of their houses, even although such articles are not for sale and do not project over the highway or any part of it. Sect. 119 of the Metropolis Management Act, 1855, only relates to permanent structural projections and has no application to such a case as this.

[They were stopped.]

Crump, Q.C., and *Rose Innes*, for the respondent. The magistrate was right. Sect. 119 of the Metropolis Management Act, 1855, deals with the same subject as 57 Geo. 3, c. xxix., s. 65,

(1) By 57 Geo. 3, c. xxix., s. 65: "And be it further enacted that if any person or persons at any time or times hereafter . . . . shall hang out or expose, or cause or permit to be hung out or exposed, any meat or offal, or other matter or thing whatsoever from any house or houses or other buildings or premises belonging to or occupied by him, her, or them over any part of either of such pavements, or over any area or areas of any houses or other buildings or premises . . . . and shall not immediately remove all or any such matters or things being thereunto required by any . . . . persons having the control of the pavements in any parochial or other district," they may be summoned before a justice of the peace and fined.

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 119: "If any porch, shed, projecting window, step, cellar door, or window, or steps leading into any cellar, or otherwise, lamp, lamp-post, lamp-iron, sign, sign-post, sign-iron, showboard, window-shutter, wall, gate, fence, or opening, or any other projection or obstruction placed or made against, or in front of any house or building . . . shall be an annoyance in consequence of the same projecting into or being made in, or endangering or rendering less commodious the passage along any street," it shall be lawful for the vestry to call upon the owner or occupier to remove such projection or obstruction, and a penalty for neglect or refusal to obey is imposed.

and therefore impliedly repeals it: *Summers* v. *Holborn District Board of Works* (1); *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.* (2) Both Acts only have regard to the safety of persons using the road or footpaths, and do not affect the rights of owners or occupiers of houses to hang out articles which do not project over any part of what is used by the public.

Poland, Q.C., in reply, referred to *Brackley* v. *Vestry of St. Mary, Battersea.* (3)

DAY, J. I have no doubt about this matter. In my judgment Michael Angelo Taylor's Act, s. 65, is not repealed as to this particular subject—certainly not expressly, and, in my judgment, not by implication. It does not come within the principle explained by Cave, J., in the case of *Summers* v. *Holborn District Board of Works.* (1) There is no analogy between the two cases. This is a specific offence created by Michael Angelo Taylor's Act which is not dealt with in any way under the Metropolis Local Management Act, 1855; so there is no ground whatever for the suggestion that the latter Act repeals these provisions in s. 65 so far as they are applicable to this particular offence. The provisions of the portion of the section under which this conviction has been sought are in no way repealed by anything that is to be found in the later Act.

The provision in the earlier Act, in my opinion, does not relate to a danger to highways at all; it relates to things hung out, it does not matter whether over highways or not over highways. Any unsightly thing that is hung outside the house which a person is called upon to remove by the local authority is within the mischief of the Act. There is no question of highways at all. That is made clear by the use of the word "area," if for no other reason.

WRIGHT, J. I am of the same opinion. I think it is clear that the judges who decided *Summers* v. *Holborn District Board of Works* (1) did not think that there was anything like a general repeal of the provisions of Michael Angelo Taylor's Act

(1) [1893] 1 Q. B. 612. (2) [1891] 2 Q. B. 171.
(3) 23 Q. B. D. 486.

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by the Metropolis Management Act, 1855; otherwise they would not have been driven to make the observations which they did upon the particular inconsistency in the case of costermongers who were authorized, subject to regulations, by the latter Act, to do things which they would have been prohibited from doing under the former Act.

I think the respondent comes within the provision in Michael Angelo Taylor's Act against hanging out matters or things "over any part of either of such pavements, or over any area or areas of any house or other building." I see nothing inconsistent with the Metropolis Management Act, 1855, in that provision, and I am therefore of opinion that the latter Act did not either expressly or impliedly repeal so much of s. 65 of Michael Angelo Taylor's Act as relates to this particular offence.

The case must be remitted to the magistrate with this expression of our opinion.

Case remitted to Magistrate.

Solicitors for appellant: *Clarkson, Greenwells & Co.*

Solicitors for respondent: *Stollard & Swan.*

A. P. P. K.

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June 19.

LONDON COUNTY COUNCIL *v.* LAWRANCE & SONS.

Metropolis—Management Acts—Height of Buildings—House at corner of two Streets—Building erected on the side of a new Street—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 85.

By s. 85 of the Metropolis Management Amendment Act, 1862, no building except a church or chapel is to be erected on the side of a new street of a less width than fifty feet, which exceeds in height the distance from the external wall or front of such building to the opposite side of the street, without the consent in writing of the Metropolitan Board of Works (now the London County Council).

The respondents' house was built at the corner of an old street and of a new street less than fifty feet wide; the front of the building and the main entrance were in the old street. The house was, without the written consent of the London County Council, built to a height greater than the width of the new street:—

Held, that, although its main frontage was in the old street, the house was nevertheless "erected on the side of a new street" within the meaning of s. 85, and that an offence had therefore been committed by the respondents against that section.

CASE stated by a metropolitan police magistrate.

A complaint was made by the appellants that the respondents

had unlawfully erected a building on the side of Kensington Court, being a new street of a less width than fifty feet, exceeding in height the distance from the external wall or front of such building to the opposite side of such street, without the written consent of the London County Council, contrary to s. 85 of the Metropolis Management Act Amendment Act, 1862 (25 & 26 Vict. c. 102).

At the hearing, on November 11, 1892, it was proved that Kensington Court was of a less width than fifty feet, and that the height of the building erected by the respondents, as measured from the level of the centre of the street, immediately opposite the building, to the parapet or eaves of the building, was 74 ft. 10 in., and that the distance from the external wall of the building to the opposite side of the street was 45 ft. 1 in. The building was at the corner of Kensington Court and Kensington Road, and it was proved that Kensington Court was a new street within the meaning of the Metropolis Management Amendment Act, 1862, and that Kensington Road was not a new street. It was admitted by the appellants' surveyor that he had seen the plans shewing the height to which it was intended to carry the building before it was commenced, and that the appellants knew before April, 1892, of the height to which it was intended to carry it. There had previously been a dispute as to the frontage-line of the building, and in the certificate of the appellants' architect and the decision of the special tribunal, which were put in evidence, the site of the building was described as being situate in Kensington Road.

The front of the building was in Kensington Road, and the entrance to it was from that road; there was a small tradesmen's entrance from the area at the side of the building in Kensington Court, but with that exception there was no entrance except from Kensington Road.

It was contended for the respondents that the building was, in fact, situated in Kensington Road, and was not situated in Kensington Court, and that it was not a building erected on the side of Kensington Court, and did not constitute an offence against 25 & 26 Vict. c. 102, s. 85.

The learned magistrate found as a fact that the building

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fronted on and was situate in Kensington Road, and held that although the side of the building abutted on Kensington Court, the building was not erected on the side of Kensington Court within the meaning of, and so as to be subject to, the provisions of the said section, and he therefore dismissed the complaint. The question for the opinion of the Court was whether the decision was right in law. (1)

Avory, (*Finlay, Q.C.*, with him), for the appellants. The primary object of the section is to secure the free access of light and air to new streets, and, with that view, a strict limitation is placed upon the height of any building erected on either side of the street. It makes no difference in the present case that the front door of the house is in the Kensington Road, which is an old street; the section is not aimed merely at houses whose chief frontage is towards a new street, but also at houses any portion of which is erected at the side of such street. The measurement of the width of the street "from the external wall or front" of the building does not limit the operation of the section to cases where the "front" faces the new street, for the front of a building may, to a certain extent, be different from its external wall, as in the case of a bay window. There is no authority as to the construction of s. 85; but the decisions under s. 75, shew clearly that a corner house may have to conform to the building-line of both streets.

[They cited *Barlow* v. *Kensington Vestry* (2); *Gilbart* v. *Wandsworth District Board of Works*. (3)]

Dickens, Q.C. (*T. Willes Chitty*, with him), for the respondents. It is not disputed that a corner house may be situated in two streets; but it must always be a question of fact whether it is situate in both, and the real question is whether this house is

(1) By 25 & 26 Vict. c. 102 (The Metropolis Management Amendment Act, 1862), s. 85: "No building, except a church or chapel, shall be erected on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works . . . ."

(2) 27 Ch. D. 362; 11 App. Cas. 257.

(3) 60 L. T. 149.

situate in Kensington Court. The magistrate has found as a fact that it is not situate in both streets, but in Kensington Road; it is therefore impossible that the house can be in Kensington Court for the purpose of the provisions of s. 75 as to the building-line; and the fact that that section does not apply is a strong argument that s. 85 does not, for the two sections must be brought into harmony. Though physically at the side of a new street, the house, not being situate in that street, is not "erected at the side of a new street" within the meaning of the section. To hold the contrary would lead to extraordinary results, for a new street less than fifty feet wide might be driven out of an old street next door to a house ninety feet high, the owner of which, if he ever desired or were compelled to rebuild it, could only rebuild it to a height of less than fifty feet. A limitation must be placed on the general language of the section, and that limitation is to be found in the section itself, in the provision for the measurement of the width of the street "from the external wall or front" of the house, which must mean the external wall in the sense of being the front.

MATHEW, J. The question for our decision is really very simple; we have to construe the language of this section, with the result that, in my opinion, it is impossible for the respondents to contend with success that the case does not fall within it. The section forbids any building, except a church or chapel, to be erected on the side of a new street of a less width than fifty feet which shall exceed in height the distance from its external wall or front to the opposite side of such street, without the consent of the proper authority. The building in question is a corner house, erected fronting the Kensington Road, but with an external wall in Kensington Court; and it is contended that the provisions of the section have been violated because the side of the building in Kensington Court has been carried to a height exceeding the width of that street without the consent of the London County Council having been obtained. The respondents contend that the house cannot be said to be erected on the side of Kensington Court, because its main frontage is in Kensington Road; but I cannot agree with this contention. There might have

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Mathew, J.

been more to say on behalf of the respondents if the word used in the section had been "situate" instead of "erected," though even then the argument would not have been a strong one; but, as it is, the language is perfectly plain, and this house is a building erected on the side of a new street, and its height exceeds the width of that street measured between the external walls of the houses. The learned magistrate came to the conclusion that because the house was situate in Kensington Road, in the sense that its principal frontage was there, it was therefore not erected on the side of Kensington Court; but I cannot adopt that conclusion. I think that his decision was wrong, and that the case must be sent back to him with an intimation of our opinion.

WRIGHT, J. I am of the same opinion.

COLLINS, J. I concur.

Judgment for the appellants.

Solicitor for the appellants: *Blaxland.*

Solicitors for the respondents: *Poole & Robinson.*

W. J. B.

C. A.

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May 17, 18.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* GYNGALL.

Infant, Custody of—Parent and Child—Guardianship, Right of Parent to—Absence of Misconduct by Parent—Interference with Parental Right, Grounds for—Habeas Corpus, Jurisdiction of Court upon—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 16, 25, *sub-s.* 10.

On an application by habeas corpus, by the mother, who was the legal guardian, of a female infant, aged about fifteen, for the custody of such infant:—

Held, affirming the judgment of the Queen's Bench Division, that, having by virtue of the Judicature Act, 1873, on such an application the Chancery jurisdiction with regard to the custody of infants, the Court, although the mother had not been guilty of any misconduct to disentitle her to the custody of the child, would, if satisfied that it was essential for the welfare of the child, refuse to give the mother such custody.

Grounds upon which a parent's rights may be interfered with considered.

APPEAL from the decision of a Divisional Court (Lord Coleridge, C.J., and Lopes, L.J.) upon the return to a writ of habeas

corpus, refusing to order that a child should be delivered up to the prosecutrix, her mother, and allowing her to depart from the court with the defendant.

The facts, so far as material to this report, appeared to be as follows. The defendant, in whose custody the child was before being brought up on the return, was a lady who kept a convalescent home at Weymouth, under the patronage of the Rev. Mr. and Mrs. Duckworth. The child, a female, was born at Nice, on August 25, 1878, the parents being foreigners and of the Roman Catholic faith. The child was baptized in a Roman Catholic church, and was brought up as a Roman Catholic. The father deserted the mother about the end of 1879, and was since dead. The child, while in the defendant's charge, had at the defendant's request written down her recollections as to the history of her past life, which statement was brought before the Court as an exhibit to an affidavit by the defendant and referred to in the judgments of the judges. It appeared from such statement that the child had been left by her mother at Nice, when an infant, in the charge of a woman and her husband, natives of that place, with whom she remained some years, the mother in the meantime having been in service as a lady's-maid and having gone to the United States. The mother, who was subsequently married again to a man who had been a valet, then removed the child from Nice, on which occasion the child screamed and struggled against being removed, supposing the persons with whom she had been living to be her father and mother. The child appeared to have subsequently been with the mother at various places in London and in Paris.

In 1888 the second husband died of consumption. There was evidence from the child's statement and on affidavit tending to shew that the mother was in a state of poverty, and was not in a position to support the child, who appeared to have been in delicate health. On the other hand, there were statements to the contrary effect on affidavit by the mother, detailing provisions made by her for the maintenance and clothing of the child. The Court, however, as will be seen from the judgment, came to the conclusion that the mother would probably be unable to keep the child with her if delivered up to her. In 1889 the mother

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was residing in Hampstead, and striving to maintain herself by taking in dressmaking. On August 8 in that year the child, being in bad health, was, through the intervention of the Rev. Mr. Davys, the vicar of the parish in which the mother resided, sent to the home kept by the defendant at Weymouth, where she stayed till September 19. During the child's stay at Weymouth she was allowed, in accordance with a previous arrangement with the mother to that effect, to go to a Roman Catholic place of worship and to read Roman Catholic religious books.

It appeared from the child's statement that she was in October, 1889, sent by her mother to a Roman Catholic convalescent home at Bournemouth, her maintenance at which was paid for by Father Gallwey, a Roman Catholic priest, and where she remained till some time in March, 1890. She stated that after that she had been at a convalescent home at Seaford for some weeks. In September, 1890, the child was, through the intervention of the Rev. Mr. Davys, again admitted to the home kept by the defendant at Weymouth, the mother herself taking her down to the home; and she remained there till April, 1891, the expenses of her maintenance there being defrayed by the Rev. Mr. Davys and Mrs. Duckworth. While there she went to a public elementary day school, presided over by Canon Stephenson, and attended by children of all denominations, including Roman Catholics. In April, 1891, the mother requested that the child might be sent back from Weymouth; but as she did not forward any money for travelling expenses the defendant did not send the child back; but ultimately a Mr. Maude came and provided for her travelling expenses, and she went back. She was then received into a convent school at Brighton. In September, 1891, the mother was seeking to obtain a situation as lady's-maid; and, having obtained an engagement to go to Paris in that capacity, she sent for the child to come from Brighton to her lodgings at Hampstead, to take leave of her before going to Paris. She then departed for Paris, leaving the child at the lodgings with the sum of seventeen shillings, out of which, according to the child's account, she was to buy boots and certain other matters, leaving a balance of six shillings. There was some dispute about the circumstances under which the child was left,

the child's account being that the mother told her not to go back to Brighton till she heard from her, and that she would send more money, which she did not do; but the mother's statement being that she had arranged that the child should return to Brighton, and that one Father Clark, a Roman Catholic priest at Hampstead, should see to the child if she had not time before leaving for Paris. Father Clark came to see the child after the mother's departure, and proposed to send her to Brighton; but she refused to go there. The child then applied to the Rev. Mr. Davys, expressing her desire to go back to Weymouth, and he wrote to the mother that, unless she wrote to the contrary in course of post, he would make arrangements to send the child to Weymouth. Not hearing from the mother, he sent the child to the defendant's home again. It appeared that the child was happy and comfortable at the defendant's home, and wished to remain there; that she was highly intelligent and advanced for her age, and that she was being trained at the public elementary school at Weymouth as a pupil teacher, and was making good progress. It further appeared from her affidavit that, when she was at Hampstead, she had been to Protestant places of worship and read Protestant Bibles, and, without any influence from any one, her religious opinions had begun to change, and that she now entertained Protestant views. It will be seen that the Court came to the conclusion that there had not at any time been any proselytism, or improper influence brought to bear on the part of those who had the custody of the child, in order to induce her to change her religion. There had been a previous application to Denman, J., at chambers for a habeas corpus, when he saw and questioned the child, and came to the conclusion that it would be contrary to the child's welfare to interfere with the custody in which she then was. He therefore refused the application. A habeas corpus having been subsequently applied for by the mother, and issued by the Divisional Court, on the return thereto the judges (Lord Coleridge, C.J., and Lopes, L.J.) saw the child, and came to the same conclusion as that at which Denman, J., had arrived—viz., that it would be contrary to her welfare that she should be removed from the home at Weymouth and delivered up to the mother.

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T. Terrell, for the prosecutrix. The father of this child being dead, the mother is the guardian of the child and is entitled to the custody of it: Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 2, 4. It is submitted that with regard to infants, under the age of fourteen in the case of boys, and sixteen in the case of girls, the right of the parent to the possession of the child is absolute, except in the cases of misconduct or desertion or abandonment of the parental right by the parent; and the Court, except in such cases, cannot interfere with the rights of the parent or consider either what the wishes of the child may be, or what they may think to be most for its benefit: *Reg.* v. *Clarke* (1); *Reg.* v. *Howes.* (2)

[KAY, L.J. Those were cases of habeas corpus in a Common Law Court. Has not the Court of Chancery always exercised in the case of infants a parental jurisdiction in control of the parent's rights, where it is essential to the welfare of the infants? Now, by s. 25, sub-s. 10, of the Judicature Act, 1873, the rules of equity with regard to the custody of infants are to prevail.]

It is submitted that there is no authority to shew that the Court of Chancery has, in the absence of misconduct by the parent, exercised a general jurisdiction to interfere with his or her rights with a view to the supposed interests or welfare of the child. If the parent be guilty of misconduct, he or she may lose his or her right, and then the Court will have a discretion to act for the welfare of the child with regard to its custody. But, in the absence of anything to take away the parent's rights, it is submitted that there is no such jurisdiction. Where would be the limits of such a jurisdiction? The Court cannot surely take the child away from the parent merely because the child will be socially or physically, or even morally or religiously, better off, in the absence of misconduct by the parent. If the Court had a general jurisdiction to interfere with parental rights for the benefit of the child, it might deprive the parent of the child in any case where a person who had better means and a better position than the parent was willing to adopt it.

In the case of *In re Agar Ellis* (3), the Master of the Rolls said

(1) 7 E. & B. 186. (2) 3 E. & E. 332.
(3) 24 Ch. D. 317.

that Courts of Law and Equity administered the law alike in proceedings under writs of habeas corpus. The jurisdiction of the Chancery Courts in regard to infants as such had relation only to cases where infants were wards of Court.

[KAY, L.J. The jurisdiction has been exercised in other cases: see *In re Scanlan* (1), and per Lord Cottenham, L.C., in *Warde* v. *Warde*. (2)]

The Custody of Children Act, 1891 (54 & 55 Vict. c. 3), shews that misconduct, desertion, and abandonment of the parental duty are the only things that can affect the parent's right: see ss. 1 and 3.

[LORD ESHER, M.R. That statute does not affect the jurisdiction formerly exercised by the Court of Chancery; s. 1 only gives the Court a discretion not to issue a habeas corpus in cases within it; and s. 4 takes away the discretion to order the child to be delivered up to the parent in certain cases.]

The case of *In re Curtis* (3) shews that the Court of Chancery would not interfere where there was not misconduct by the parent.

[LORD ESHER, M.R. All that case shews is that the Court will not merely consider which of two courses is better for the child without regard to the rights of the father.

KAY, L.J. Does not the case of *In re Ethel Brown* (4) clearly shew that the Court has a discretion in cases of habeas corpus even where there is no misconduct by the parent?]

The discretion in that case was exercised under the statute 36 & 37 Vict. c. 12, s. 1, as between the father and the mother. Here the case arises as between the mother and a stranger—a case to which the statute does not apply. The case of *In re Goldsworthy* (5) was a case of misconduct by the parent.

[He proceeded to argue that, assuming the Court to have a discretion, on the facts no sufficient reason was shewn why the child should not be delivered to the mother.]

Wm. Baker, for the defendant, was not called on to argue as to the law of the case. He contended on the facts that it was

(1) 40 Ch. D. 200.
(2) 2 Ph. 786.
(3) 28 L. J. (Ch.) 458.
(4) 13 Q. B. D. 614.
(5) 2 Q. B. D. 75.

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contrary to the interests and welfare of the child that she should be removed from the custody of those with whom she then was and handed over to the mother, and therefore the Court ought not to order her to be delivered up to the mother. He stated, in answer to an inquiry by the Court, that those now providing for the education and maintenance of the child would undertake to continue to do so, if the appeal were dismissed.

Terrell, in reply.

LORD ESHER, M.R. In this case a female child of about fifteen years of age is at a home in Weymouth, under the superintendence, and I think under the actual assumed guardianship, of certain persons there. The mother of the child desired to take her away, and I think that the result of the facts is that those who had the actual guardianship and custody of the child must be taken to have refused to give her up to the mother, if she objected to go with her. Thereupon the mother applied for a habeas corpus in the Queen's Bench Division. The writ issued, and a return was made to it. The child was brought up, and the judges in the Queen's Bench Division refused to make an order that she should be delivered up by those who had the custody of her to the mother. Thereupon the mother appealed to this Court. There has been an elaborate argument as to the law of the matter. It seems to me that before the Judicature Act there were two distinct heads of law, under either of which there might have been an application in the present case. There was a common law jurisdiction, under which the Courts used to deal with these matters by habeas corpus. That jurisdiction was exercised for the purpose of determining as between two or more persons their rights. If one person wrongfully imprisoned or detained another, a motion might be made by any one on behalf of the person so imprisoned or detained for a habeas corpus before any judge, whether a common law or equity judge. That was, by any judge who exercised it, the common law jurisdiction to determine the rights between parties. That jurisdiction might be exercised in cases where there was no question of the relation of parent and child, or it might be exercised as between parents and other persons. In such latter

cases, where the dispute was with regard to the custody of a child, the question arose whether the party detaining the child had a right to detain it as against the parent. I take it that at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct. Certain statutes have been passed, which did limit to some extent the rights of the parent, though not guilty of misconduct that would have disentitled him or her to the custody of the child at common law. Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute. Up to what age a child would be considered a child for this purpose, I need not stop to inquire. Of course, there comes an age at which the Court could not say that the parent's right continued to exist.

But there was another and an absolutely different and distinguishable jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent. The present case arises after the Judicature Act, and the proceedings are in the Queen's Bench Division. The effect of that Act is, as I have often said, not to invent a new jurisdiction or to create new rights, but to alter the mode of procedure; and, there having been before two independent jurisdictions, one common law and the other equity, the Act in effect provides that, if a person proceeds in the Queen's Bench Division under the common law jurisdiction, and it turns out that the case raises questions to which the Chancery jurisdiction is applicable, the Queen's Bench Division judges are not to send the suitor to a Chancery Court, but are to exercise the Chancery jurisdiction themselves. If such a case as this had arisen before the Judicature Act, the Queen's

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Bench judges, not finding any such misconduct as would affect the parent's right, would have been bound to say that, as between the parent and the person who had the custody of the child, the right to the custody of the child belonged to the parent; but, if they had seen that, although there was nothing to limit the right of the parent as against the other person, there were circumstances calling for the exercise of the Chancery jurisdiction, they might have stayed their hands and given time for an application to be made to the Court of Chancery to exercise its authority in the matter. Under the Judicature Act, the Queen's Bench Division judges are not to do that, but are to exercise the Chancery jurisdiction themselves. In the present case I do not think that the mother has been guilty of any misconduct which as between her and other people has derogated from her right to the custody of the child. Under these circumstances, I do not think that the judges of the Queen's Bench Division assumed to exercise the common law jurisdiction. I think that they rightly assumed to exercise the other and independent jurisdiction, viz., that of the Court of Chancery. The existence of that jurisdiction is beyond dispute. In the case of *In re Spence* (1), Lord Cottenham, L.C., said: "I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of Law interfere by habeas for the protection of the person of *anybody* who is suggested to be improperly detained. This Court interferes for the protection of *infants*, quâ infants, by virtue of the prerogative which belongs to the Crown as parens patriæ, and the exercise of which is delegated to the Great Seal."

It is argued that in the exercise of that jurisdiction the Court of Chancery was bound to give the custody of the child to the parent, unless the parent had been guilty of misconduct to the extent which would in a Common Law Court have destroyed the primâ facie absolute right of the parent. The fallacy of this argument appears to me to consist in mixing up the two jurisdictions, and extending to one of them considerations which appertain solely to the other. When in the case of *Reg.* v.

(1) 2 Ph. 247.

Clarke (1) Lord Campbell said what he did, he was exercising the common law jurisdiction, and could not exercise the other. The case stood thus before him. Certain parties insisted on keeping a child of ten years of age as against a parent, and their contention was that, although the parent had not been guilty of any misconduct so as to affect her right, the child should be asked whether it wished to stay with them, and, if it did, the Court should not order it to be delivered up to the mother. Lord Campbell said that he should not ask the child what its wishes were. The meaning of the "child's wishes," as spoken of in that case, is the "child's consent." The learned Lord Chief Justice said in effect that the child's consent was immaterial, and that the consent of a child of that age could not take away the parent's right as between her and other persons, for that would be entirely to subvert the whole law of the family. It appears to me that that ruling was quite correct. That case is no authority for the present, where a different jurisdiction comes into play. Reliance has been placed on some expressions made use of by me in the case of *In re Agar Ellis* (2), where I said that the jurisdiction in cases of habeas corpus was exercised by the Courts of Chancery in the same way as at common law. I think what I said there is correct, as applicable to the exercise by Chancery judges of the common law jurisdiction on habeas corpus. I think that in cases of habeas corpus, even where the question was as to the custody of an infant, if another person wrongfully claimed as against the parent to detain the child, a Chancery judge must decide that as between the parent and such other person the latter could not detain the child as matter of right. But this has nothing to do with the jurisdiction proper to the Court of Chancery, which is what we are dealing with now. How is that jurisdiction to be exercised? The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be

(1) 7 E. & B. 186. (2) 24 Ch. D. 317.

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unwise, and may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do. The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. As Knight Bruce, V.C., said in *In re Fynn* (1), the Court must not act as if it were a private person acting with regard to his child. It must act judicially in the exercise of its power. That its jurisdiction to interfere with the parental right is not confined, as was argued, to cases where there has been misconduct on the part of the parent seems to me clear from many cases. In the case of *In re Fynn* (1) Knight Bruce, V.C., said: "Before this jurisdiction can be called into action . . . it" (i.e. the Court) "must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is *placed in such a position*, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong." That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shewn that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but—I will not say "essential," but—clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded; but that, where it is so shewn, the Court will exercise its jurisdiction accordingly. Then we have the case of *In re McGrath* (2), in which Lindley, L.J., said: "The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for the

(1) 2 De G. & S. 457. (2) [1893] 1 Ch. 143.

consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. Primâ facie it would not be for the welfare of a child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parent. If a child is brought up, as one may say, from its mother's lap in one form of religion, it would not, I should say, be for its happiness and welfare that a stranger should take it away in order to alter its religious views. Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these. As Lindley, L.J., well pointed out in the case of *In re McGrath* (1), it is the welfare of the child in the largest sense of the term that is to be considered. In the present case I proceed on the footing that the mother has not been guilty of any misconduct that would, as between her and other people, derogate from her natural right. The Court has to consider what is for the welfare of the child and for her happiness, what her prospects are if not interfered with, the fact that in a short time she will be able to choose for herself, and what her position will be if taken by the mother to live with her. This child is not a mere infant; if she were only six or seven years old the case would be very different. Again, it is not a case of

(1) [1893] 1 Ch. 143.

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attempting to take away a child from its mother; it is a question whether a child who has been away from her mother for a long period shall be forced to go back to her. If a child is living with its parent it may be a very serious dislocation of an existing tie to remove the child from the custody of the parent. But suppose the case of a child which had been living from infancy with a grandmother or an aunt, no one would say that, when the child had arrived at the age of fourteen without perhaps ever having seen either of its parents, by force of mere instinct it would necessarily prefer to be with them rather than with the persons with whom it had always lived.

What are the facts of this case with regard to the mother? I do not wish to say anything that may seem harsh about the mother; but we must consider the welfare of the child. I have spoken to the Lord Chief Justice with regard to the statements that the child has made in the written statement made by her as to her life, which I thought could not be invented, unless they were dictated to the child by some one else with fraudulent intention, or unless the child was an inventive young hypocrite; and I feel obliged to say that I am not satisfied as to the accuracy of the somewhat glowing account given by the mother of her means of providing for the child during past years. I think it appears that she has been obliged to earn her living by moving about from place to place, and from country to country, so as not to be able herself to watch over the bringing up of the child. When it was born, she was obliged to leave it in Italy or the South of France, and to go to America. She was a lady's-maid, and is stated to be a dressmaker. A lady's-maid out of employment usually is a dressmaker. In any case she has not been able regularly to keep the child with her, and the child has been consequently placed with other people for long periods of time. Her position at the present moment seems to be the same. If she had the child delivered up to her, I think the result must be that she would have to put the child away from her again. It has been suggested, I know, that the people who now have the custody of this child are vehement Protestants, and that some of them think that, unless the child is brought up as a Protestant, she is not likely to fare

well hereafter. On the other hand, it seems clear to me from what appears in this case that the mother is backed up in this application by equally earnest and vehement Roman Catholics, to whom I think it probable the child will be handed over if delivered up to the mother. We have nothing to do with the views of either of these parties. We have to consider the welfare of the child. We know that the child is at present with certain persons, who have not, I think, attempted unfairly and improperly to set the child against the religion with which, when she was with her mother, she was connected. I do not think that there was any attempt at proselytizing on their part. It appears to me that that has happened which was under the circumstances most likely to happen. The child, being placed in a Protestant atmosphere, has naturally taken to the religion of the people around her and who have been kind to her, and, without any improper exercise of influence on their part, she has come to have an opinion of her own, and her feeling is that she would like to belong to the same Church as they do. The Court, acting as a wise and high-minded parent would act, must take that feeling into consideration in considering that part of the child's welfare that consists in her happiness. The Court would not act merely on the wish or consent of the child, unless the Court thought it was for the happiness of the child. For instance, if it were not a question of a choice of a religion, but of an occupation, and the child wished to follow some occupation, such as that of a ballet-dancer, which the Court thought would not be for its welfare, the Court would disregard its wishes. But the Court ought to consider what the wishes of the child are in considering what will produce its happiness in a serious and important matter. So the child's views of religion are of importance in the present case. Then we have these other matters to consider. The child in this case is about fifteen years of age and is more than ordinarily intelligent. She is actually in a position to earn something for herself, or will certainly be in that position very shortly. In a year she would have a right to act on her own views. She is happy where she is and is well treated. It appears to me that under the circumstances of this case it would be absolutely cruel to take the child away from the

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position in which she is, at the age at which she has arrived, and with the feelings that she entertains, and to deliver her over to a mother struggling with adversity, and who would, I believe, be obliged to hand her over to persons whom she does not know and for whom she has no regard, and amongst whom she would be surrounded by a religious atmosphere the contrary of that to which she is now accustomed, and so to put her in a position in which she would probably not be happy, and where there is nothing to shew that she would be in any respect better off than she is now. I think that, acting on the principle laid down by Knight Bruce, V.C., in *In re Fynn* (1), and by Lindley, L.J., in *In re McGrath* (2), we must under the circumstances of this case say to the mother that, through no fault or misconduct of her own, she is placed in such a position as to her child that we must supersede her natural rights and say that we cannot order the child to be delivered up to her. For these reasons I think that the appeal must be dismissed.

KAY, L.J. My excuse for adding anything to what the Master of the Rolls has said is that this case involves questions of law and equity of very great importance. The first question is as to the extent of the jurisdiction of the High Court, where in a case such as this an application is made by habeas corpus to determine who shall have the custody of an infant; the second is whether, when the jurisdiction of the Court is ascertained, the facts of this case are such as to justify the Court in refusing an application for the custody of the child by the mother, who by a recent statute is under the circumstances of the case the guardian of the child. There can be no doubt what the jurisdiction of the Court of Chancery in this respect has been from ancient times. The Master of the Rolls has quoted the language of Lord Cottenham, L.C., in *In re Spence* (3), in addition to which I will refer to the language of Lord Eldon, L.C., in the case of *De Manneville* v. *De Manneville*. (4) There the question was as to the power of the Court of Chancery to control the authority of a father. Lord Eldon said: "The next consideration is whether

(1) 2 De G. & S. 457.
(2) [1893] 1 Ch. 143.
(3) 2 Ph. 247.
(4) 10 Ves. 52.

the Court has jurisdiction, in what cases, and to what extent, to control the right of the father, primâ facie, to the person of the child. In whatever principle that right is founded, it is unquestionably established, and is not disputed. I know there is a very learned opinion of Mr. Hargrave (Mr. Hargrave's Note 70. Co. Lit. 89a) as to the jurisdiction of the Court upon this point; and a very able note by Mr. Fonblanque (2 Fonb. Eq. 226) in answer to it, who has stated the principle very correctly, for in *Butler* v. *Freeman* (1) Lord Hardwicke, professing not to go upon guardianship and disclaiming wardship, puts it upon this: that the Court represents the King, as parens patriæ. That has been followed in many cases, and was clearly the principle of Lord Thurlow in *Powel* v. *Cleaver* (2), *Cruse* v. *Hunter* (3), and *Ex parte Warner*. (4) In the first of those cases it was contended that the bounty, given to the father, had put him to his election; and he could not, after receiving that legacy, withhold compliance with the condition for the education of his children. That argument could not sustain the jurisdiction. The father, not knowing that he was making the election, was at full liberty to pay back the money. But Lord Thurlow's opinion went upon this: that the law imposed a duty upon parents, and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred in which the father was unable or unwilling to execute that duty, and, further, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those who cannot take care of themselves; and have not the benefit of that care, which is presumed to be generally effectual. In those cases there was a struggle between the feelings of the father and a due attention to the interests of the child; upon the condition that his education should be conducted in the manner prescribed; which was the course of maintenance and education the best calculated to promote his happiness in the state in which that fortune would place him. But Lord Thurlow took upon him the jurisdiction

(1) Amb. 301.
(2) 2 Bro. C. C. 499.
(3) In Chancery after Trinity Term, 1790.
(4) 4 Bro. C. C. 101.

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on this ground, that he would not suffer the feelings of the parents to have effect against that duty, which upon a tender, just, and legitimate deliberation the parent owed to the true interests of the child; and his lordship separated the person of the child from the father; always taking care that the separation shall not have a greater effect than the case requires; and that the intercourse shall be as frequent and full as the case requiring the separation will permit." This statement of the jurisdiction shews that, arising as it does from the power of the Crown delegated to the Court of Chancery, it is essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again, the term "welfare" in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the Court in the exercise of this jurisdiction. The question now raised is whether on an application of this kind, viz., where a mother, who is the guardian of a child, applies for a habeas corpus in respect of such child, the High Court has such jurisdiction. The counsel for the mother sought to limit the jurisdiction of the Court by citing certain cases in which before the Judicature Act application was made for a writ of habeas corpus. I deny the applicability of these decisions as authorities for cases which arise after the passing of the Judicature Act. The language of s. 25 of the Act of 1873 is clear. It recites that it is expedient to take occasion of the union of the several courts whose jurisdiction is thereby transferred to the said High Court of Justice to amend and declare the law to be thereafter administered in England as to the matters after mentioned; and by sub-s. 10 it provides that in questions relating to the custody and education of infants the rules of equity shall prevail. Therefore, where as here the application is by way of habeas corpus, the real object being to determine who is to have the custody of children, the rules of equity must prevail. The Court is not since the Act in the difficulty in which Courts of Common Law formerly were when

such an application was made to them. They are not bound to refer the matter to a Chancery Court, but can exercise the parental jurisdiction of the Court of Chancery themselves. I will take as an illustration of the extent of that jurisdiction the case of *Ex parte Hopkins* (1), which came before King, L.C. There the petitioner had three daughters, the eldest of whom was thirteen. His brother, having no family, received them into his house in London and left them large legacies by his will. The children continued after the testator's death at the house, at which one of his executors then resided. The petitioner applied by petition to have the children delivered to him. The Chancellor said: "The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature; and it cannot be conceived that, because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right that naturally belongs to me, that of being their guardian. But, notwithstanding this declaration, yet I am of opinion, and do not see any precedent to the contrary, that I cannot in so summary a way as on a petition deliver over the bodies of these infants to their father, any more than I could, on a bare petition, order a trustee to deliver over possession of the trust estate to the cestui que trust, who must in that case bring his bill, and so must the petitioner do here. There are legal remedies for the recovery of a ward, viz., a writ of ravishment of ward, homine replegiando, and habeas corpus." There is a note to this case which has received the approval of Bowen, L.J., in a case to which I will presently refer, to the following effect: "Sed quære whether this writ (writ of ravishment of ward) will lie unless the defendant in the action takes away the ward; and, as to a homine replegiando, and habeas corpus, which last especially seems calculated only for the liberty of the subject, if the parties brought up thereon will acquaint the Court that they are under no force, the Court will let them go back to the places from whence they came; or, if they appear to be under restraint, will set them at liberty, but not deliver them into the custody of another, nor in a proceeding of that nature determine private rights, as the right of guardianship

(1) 3 P. Wms. 151.

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evidently is: for then the parties would be concluded from appeal or writ of error thereon." I observe that the report states that "his lordship asked the eldest daughter then in Court, whether she was under any force, and where she would rather be; who replied that she was not under any force; and that, though she had all imaginable duty for her father and mother, yet, her uncle the testator having been so kind to her by his will, she thought herself under an obligation to continue where he intended she should, and that she thought it to be his intention she should continue in the house where he himself had placed her: whereupon the Chancellor dismissed the petition," but directed that the father and mother should, at all reasonable times, have access to the children. I note that because it is a good illustration of the very wide jurisdiction long exercised by the Court of Chancery. The case in which Bowen, L.J., approved of the note to the case of *Ex parte Hopkins* (1) was *In re Agar Ellis.* (2) In that case the Master of the Rolls said: "It is the universal law of England that, if any one person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a habeas corpus, and thereupon the person, under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon habeas corpus is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case the law has now fixed upon certain ages—as to boys the age of fourteen, and as to girls the age of sixteen—up to which, as a general rule, the Court will not inquire upon a habeas corpus, as between the father and the child, as to the consent of the child to the place wherever it may be. But above the age of fourteen in the case of a boy, and above the age of sixteen in the case of a girl, the Court will inquire whether the child consents to be where it is; and, if the Court finds that the infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of the application

(1) 3 P. Wms. 151. (2) 24 Ch. D. 317.

for a habeas corpus falls away." This language of course had reference to the case of *Reg.* v. *Clarke* (1), in which the application being for a habeas corpus before the Judicature Act, and the child in question being a girl and under sixteen, Lord Campbell, C.J., said that, in the Courts of Common Law such a child being deemed incapable of consenting, he would not inquire into the wish of the child. I have already shewn by reference to the case of *Ex parte Hopkins* (2) that there never was any such rule in the Court of Chancery. There the judges never abstained from inquiring what was the desire of the child until the age of fourteen in the case of a boy or sixteen in the case of a girl. The eldest daughter in the case of *Ex parte Hopkins* (2), whom King, L.C., questioned, was of the age of thirteen. When one comes to consider what it is that the Court of Chancery had to determine and what the main consideration in exercising its jurisdiction was, viz., what was really for the welfare of the child, whose interests were being discussed, it is obvious that, if the child were of any reasonable age, the Court would hardly desire to determine that question without seeing and speaking to the child and ascertaining its own views on the matter. So again and again in such cases, where the child was not of very tender years, the practice has been that the judge himself saw the child, not for the purpose of obtaining the consent of the child, but for the purpose, and as one of the best modes of, determining what was really for the welfare of the child. That this was the jurisdiction to be exercised by the High Court upon the application by habeas corpus by the mother of this child I have not the least doubt.

The second question, which is one of importance and some difficulty, is whether the facts of this case did justify the High Court in refusing the application of the mother. I agree with what the Master of the Rolls has said to the effect that it would be a different question where the attempt is to take the child away from the custody of the father or mother, and a very strong case would have to be made out to deprive the parent of the custody of a child which had up to that time been in the custody of the parent. Here we have not to deal with that case. It is

(1) 7 E. & B. 186. (2) 3 P. Wms. 151.

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very different where, as here, the mother has at two separate times voluntarily placed the child in the institution where it now is and is seeking the assistance of the Court in removing the child from that institution against the wish of the child. Denman, J., thought it right to see the child. The Lord Chief Justice and Lopes, L.J., also thought it right to have an interview with the child, and at that interview the question, whether a statement in writing made by the girl was an accurate and independent statement or not, was investigated, and they came to the conclusion that, whether it was in all respects quite accurate or not, the child's statement was an unbiassed, independent statement made by the child from her own recollection. That statement weighs with me a great deal. Taking into consideration all the circumstances; the life, which without any fault of her own the mother has been obliged to lead; the age at which the child has arrived; the fact that for such a considerable portion of her life she has not really lived with her mother; the consequences of restoring her to her mother against her wish, and the life which the mother will probably be in future compelled to lead, I think that it is shewn that a wise parent or guardian, placed in the position in which the mother is, would not, if actuated by proper feeling for the child, wish or attempt to take the child away from the institution in which she is. As I have stated, the superintending power in respect of infants, which Lord Eldon said the Court of Chancery had always exercised by delegation from the Crown as parens patriæ, must be exercised as the Court may think for the best interests of the child. I cannot doubt that the Court has jurisdiction in this case to enable it to say that under the circumstances it would not be wise or for the interest of the child, but would be contrary to the interest and welfare of the child, to assist the mother in carrying out what she desires. For these reasons I think that this is a case in which, though no kind of aspersion can be cast on the character of the mother, we must, acting for the true welfare of the child, decline to assist the mother. I understand that an undertaking has been given by those in charge of the child that the child shall continue to be educated in the same manner as hitherto, and we are also told that they are willing to undertake that the child while in the

institution shall be maintained as well as educated. I think we ought to insist on such an undertaking.

A. L. SMITH, L.J. I agree with the judgment of the Master of the Rolls and desire to adopt it as my own, but I wish to add the following observations. The age of this girl, nearing as she is the age of emancipation, has great weight in leading me to the conclusion that she should be left where she is. I am satisfied on the facts that, if she were taken away from the institution where she now is, and where she is commencing to make a livelihood, it would only make a useless and vexatious break in her life. I have little doubt that, when she becomes emancipated at the age of sixteen, she would, if taken away, return. Considering her age, and the short time she can be kept away from the institution where she is being happily brought up, and wishes to remain, I think that, if we compelled her to leave, and handed her over to her mother, we should not be acting for the true "welfare" of the child in the large sense in which the term was used by Lindley, L.J., in his judgment in the case of *In re McGrath* (1), to which I was a party. I think that the appeal must be dismissed.

Appeal dismissed. (2)

Solicitor for prosecution: *Elton.*
Solicitors for defendant: *Wainwright & Co.*

(1) [1893] 1 Ch. 143.
(2) The Court ordered that the mother should be allowed access to the child once a week.

E. L.

1893
March 2;
June 26.

WARDEN AND GOVERNORS OF SIR ROGER CHOLMELEY'S SCHOOL AT HIGHGATE *v.* SEWELL AND OTHERS.

Practice—Defence and Counter-claim—Application for Relief under Conveyancing Acts—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 14, 69—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4.

By s. 4 of the Conveyancing Act, 1892, where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant in a lease, the Court may, on application by any person claiming, as underlessee, any estate or interest in the property "either in the lessor's action or in any action brought by such person for that purpose," make an order vesting for the whole term of the lease or any less term the property comprised in the lease in any person entitled as underlessee upon such conditions as the Court may think fit:—

Held, that an application by an underlessee for a vesting order under this section may be made by defence and counter-claim in the lessor's action for possession.

SUMMONS referred to the Court by the judge at chambers.

The facts and arguments sufficiently appear from the judgment of the Court.

William Graham, for the plaintiffs.

Whitehorne, Q.C., and *Wightman Wood*, for the defendants.

Cur. adv. vult.

June 26. The judgment of the Court (Lord Coleridge, C.J., and Hawkins, J.) was read by

HAWKINS, J. I have to deliver the judgment of the Lord Chief Justice and myself in this case, argued before us some time ago.

This is a summons referred to us from chambers. It prays that judgment may be entered for the plaintiff for possession of the premises known as the London Coffee House; or in the alternative:—first, that the defence may be struck out on the ground that it discloses no reasonable answer to the plaintiffs' claim; secondly, that the counter-claim may be struck out or disallowed on the grounds that it is embarrassing and discloses no reasonable cause of action, and cannot be conveniently disposed of in this action.

The plaintiffs are lessors of the premises in question, and the object of this action is to recover from the defendants, who are underlessees thereof, possession under a proviso, contained in the original lease, for re-entry in case of the bankruptcy of the lessee, his executors, administrators, or assigns.

The object of the defence and counter-claim is to obtain relief against such forfeiture by means of a vesting order under the Conveyancing Act, 1892. The plaintiffs contend that such relief can only be obtained upon application by summons at chambers. The defendants contend that, even assuming it may be obtained at chambers, it may be also obtained by resisting either by plea or counter-claim the plaintiffs' action for possession.

The statement of claim delivered on January 3, 1893, alleges that by a lease granted on June 14, 1878, the plaintiffs demised the London Coffee House to John Jones for fifty years, subject to a proviso for re-entry if the lessee, his executors, administrators, or assigns, or any of them, should be adjudged bankrupt: that by various assignments the interest of Jones became vested in one Richard Sewell (a defendant): that in September, 1890, Sewell sublet the premises by way of mortgage to the defendants Nicholsons & Co., and subsequently, by way of second mortgage, to the defendants Flower & Son: that on July 19, 1892, Sewell was adjudicated bankrupt, and the defendant Wildy was appointed trustee under the bankruptcy: that Nicholsons & Co. are in possession, claiming title under the underlease, and refuse to give up possession though requested so to do.

The plaintiffs claim, first, a declaration that they are entitled to possession; secondly, possession; and, thirdly, rent apportioned and mesne profits.

The statement of defence by the defendants Nicholsons & Co. admits the lease, the assignments, and the mortgage (which was to secure 24,500*l.*), and alleges that on May 31, 1892, they took possession in accordance with the underlease; that they paid the quarter's rent due at Midsummer, 1892, and have always been willing and ready to pay the rent which has accrued due, but that the plaintiffs have refused to accept it. They deny that the plaintiffs are entitled, as against them, to possession or to

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any apportionment of rent or mesne profits, and submit that they are entitled to relief from the alleged right of re-entry under the provisions of the Conveyancing Act, 1892. They also counter-claim an order vesting in them the property in question for the term of their underlease on such conditions as to the Court may seem fit.

By the Conveyancing Act, 1881, s. 14, sub-s. 2, it is enacted that where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, the lessee (this includes an under-lessee, see sub-s. 3) may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit, on such terms as the Court thinks fit. By sub-s. 6 (i.), the section was not to apply to a condition for forfeiture on the bankruptcy of a lessee; but the Conveyancing Act, 1892, by s. 2, sub-s. 2, enacts that s. 14, sub-s. 6, of the Act of 1881, shall apply to a condition for forfeiture on bankruptcy in such a case as the present. The same statute of 1892 also enacts, by s. 4, "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, *either in the lessor's action* (if any) *or in any action brought by such person for that purpose*, make an order vesting for the whole term of the lease or any less term, the property comprised in the lease, or any part thereof, in any person entitled as underlessee to any estate or interest in such property upon such conditions," etc., as the Court in the circumstances of each case shall think fit; but in no case shall any underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease.

Mr. Graham, for the plaintiff, in his argument before us, contended that the defence and counter-claim were both bad—the defence as disclosing no defence to the plaintiffs' action, the counter-claim as disclosing no reasonable cause of action in the

defendant, and also on the ground that it was embarrassing, and could not conveniently be disposed of in this action.

As to the first and second of these points, it would be rash to suggest that they are absolutely free from doubt—for as regards the defence it is obvious that at the present moment there is no actual and complete legal answer to the claim for possession—simply because hitherto no relief from the plaintiffs' right to re-enter has yet been obtained. It must, however, be observed that if the defendants' case, as disclosed on the pleadings, be found or admitted to be true in fact, and the Court shall think fit to grant such relief as is claimed, there will, before the judgment in the action is given, be brought into existence a perfect defence both to the claim for a declaration that the plaintiffs are entitled to possession and to the claim for actual possession. At this moment it is but an inchoate defence, impliedly given by the Conveyancing Act, 1892, which will or will not be perfected according to the view taken by the Court before which the action is tried.

Both defence and counter-claim depend on the true interpretation of the sections in the statutes of 1881 and 1892 (which are to be read as one Act), to which we have already referred. The 4th section of the Act of 1892 expressly enables an under-lessee to apply by way of relief in the lessor's action (if any), or otherwise in an action to be brought by himself. It does not, it is true, prescribe how or in what form that application is to be made; but it is clear, if it is to be made "in the lessor's action," that it must be made to the Court in which that action is pending; and it seems to us, in the absence of any enactment to the contrary, that it may be conveniently made in the form of a counter-claim which is in substance an application for a vesting order, which if granted would put an end to the plaintiffs' right to possession. It is necessary to refer to the 69th section of the Act of 1881, which enacts by sub-s. 1 that "all matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court"; and by sub-s. 3, that "every application to the Court shall, except where it is otherwise expressed, be by summons at chambers."

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WARDEN, &c., OF SIR ROGER CHOLMELEY'S SCHOOL AT HIGHGATE v. SEWELL.

Hawkins, J.

It is difficult to suppose that the legislature intended that these sub-sections should be applicable to proceedings for relief under s. 14. The lessor has a right to bring his action in either Division of the Supreme Court. In the present case he has brought it in the Queen's Bench Division. The defendants propose to apply for relief, as the 14th section gives them a right to do, "in such action." We do not see how the sub-sections requiring applications to be made in Chambers in the Chancery Division can be applied to them. So again, supposing an underlessee were minded, as the section allows him, to apply for relief in an action brought by himself, in such an action his claim must be for relief in the shape of a vesting order; and if he could so claim in an action brought by himself, why should he not in the lessor's action counter-claim for relief against the forfeiture sought to be enforced by that action?

We think that there is good reason for the contention that the course taken by the defendants is sanctioned by the not too clear language of the enactments.

The vesting order mentioned in the 4th section of the Act of 1892 is a novel form of relief expressly given by that section, and that section points to the necessity of the application for that form of relief being made in an action, whether such action be brought by the lessor for possession or by the underlessee for the purpose of claiming relief. The legislature could scarcely have contemplated the bringing of an action by the underlessee for the mere purpose of enabling him to make an application at Chambers, and we do not think that there is any objection to the course adopted by the underlessees in this case, who desire to have this important link in their title placed on record, if the Court thinks fit to grant the vesting order claimed.

In *Ruttledge* v. *Whelan* (1), before Palles, C.B., and Fitz-Gerald, B., in the lessor's action for possession the Court refused a motion for relief from right of re-entry under s. 14 of the Act of 1881, upon the ground that the defendant's proper course was to have filed a counter-claim seeking equitable relief. We do not feel called upon to determine whether or not application for relief might *after action brought* be made by motion or

(1) 10 L. R. Ir. 263.

summons as well as by counter-claim, as to which see *In re Peach*, per North, J. (1) Nor do we feel it necessary to our decision in the present case to discuss any of the various enactments, orders, and rules mentioned and referred to in the arguments addressed to us other than those we have discussed: they do not in our opinion materially assist us to determine the sole question before us, viz., whether the defence and counter-claim ought to be struck out, the one because it discloses no defence, the other because it is embarrassing and inconvenient. We think that they ought not: see the *Attorney General of the Duchy of Lancaster* v. *London and North Western Ry. Co.* (2) They are pleaded bonâ fide, and in our judgment are warranted by the provisions of the statute of 1892. We therefore dismiss the summons with costs.

Summons dismissed.

Solicitors for plaintiffs: *Wilmer & Reeves.*
Solicitors for defendants: *Nash, Field, & Withers.*

(1) 33 Sol. J. 575. (2) [1892] 3 Ch. 274.

A. P. P. K.

C. A.
1893
July 6.

[IN THE COURT OF APPEAL.]

DUKE AND ANOTHER *v.* DAVIS AND OTHERS.

Practice—Change of Parties—Death of one of several Defendants—Action remitted to County Court—Application to compel Plaintiff to proceed—Jurisdiction—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*Order* XVII., *r.* 8.

One of several defendants, whom it was sought to make jointly and severally liable on a contract, died intestate shortly after delivery of defence. Afterwards, but before the appointment of an administrator, the plaintiffs obtained an order under the County Courts Act, 1888, s. 65, transferring the action to the county court. The action was tried in the county court, and judgment was given for the surviving defendants. An administrator of the deceased defendant's estate was appointed, and applied in the High Court under Order XVII., r. 8, to compel the plaintiffs to proceed against him, or in default for judgment:—

Held (affirming the judgment of the Queen's Bench Division), that the order transferring the action to the county court was, at the utmost, merely irregular and not void as against the administrator, and that, as long as that order stood, the High Court had no jurisdiction to make the order for which application was made.

Semble, the order transferring the action to the county court was rightly made.

APPEAL from the order of a Divisional Court (Grantham and Bruce, JJ.), dismissing an application by the administrator of a deceased defendant, to compel the plaintiffs to proceed with the action against him, or in default for judgment. (1)

The facts were as follows.

The action, which was commenced in the High Court, was against five directors of a tramway company, seeking to make them, jointly and severally, personally liable upon a contract. Three days after delivery of a statement of defence, one of the

(1) The case in the Divisional Court is reported ante, p. 107. By Order XVII., r. 8: "When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or the person entitled to proceed) to proceed within such time as may be ordered; and in default of such proceeding judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued."

defendants died intestate, and no administrator was then appointed. Afterwards, the plaintiffs obtained an order under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65, transferring the action to the county court. The action was tried in the county court, and judgment was given in favour of the surviving defendants. Afterwards, an administrator of the estate of the deceased defendant was appointed, who made an application as above by summons, which was referred by Wills, J., to the Court. The Divisional Court refused the application.

Cababé, in support of the appeal. The action was not transferred to the county court as against the deceased defendant. When he died, the action was abated or suspended so far as he was concerned, and no step could be taken in it which would affect his estate until an administrator was appointed. Either the order transferring the action was invalid altogether and a mere nullity, or it was valid only as regards the surviving defendants who were parties to it: *Lloyd* v. *Dimmack* (1); *Eldridge* v. *Burgess* (2); *In re Shephard, Atkins* v. *Shephard.* (3) Therefore the action, so far as regards the interest of the deceased defendant, remains in the High Court. If it be suggested that the action cannot be divided into two parts, then it follows that it could not be transferred to the county court, when there was no representative of the deceased defendant, and the order transferring it was altogether void, like the order in *In re Shephard.* (3)

[BOWEN, L.J. In that case an order had been made by way of equitable execution appointing a receiver of the property of a person who was not a party to the action. There is no analogy between such a case and the present.]

This application could not have been made in the county court, because the county court rule corresponding to Order XVII., r. 8 (County Court Rules, 1889, Order XVII., r. 8), only applies, it is submitted, to actions originally commenced in the county court.

Low, for the plaintiffs, was not called upon.

(1) 7 Ch. D. 398. (2) 7 Ch. D. 411.
(3) 43 Ch. D. 131.

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BOWEN, L.J. I am of opinion that the judgment of the Divisional Court in this case was right, and should be affirmed. The action was brought against several defendants on a contract upon which it was suggested that they were jointly and severally liable. One of the defendants died intestate soon after the statement of defence was delivered. Thereupon the action as against him ceased to exist, although, upon the coming into existence of a personal representative, such representative might be made a party to the action. During the interval which elapsed between his death and the appointment of an administrator of his estate, application was made by the plaintiffs for an order under the County Courts Act, 1888, transferring the action to the county court. At that time the whole of the action was against the surviving defendants: unless and until a representative of the deceased was made a party to the action, it was not an action against any one but them. An order transferring the action to the county court was made; and in course of time it was tried as against the surviving defendants, and they obtained judgment in their favour. Afterwards, an administrator of the deceased defendant's estate having been appointed, he was not satisfied to allow the action to remain in an extinct condition as against himself, and was desirous of either obtaining a similar judgment to that which the surviving defendants had obtained, or having some provision made for the costs which had been incurred by the intestate in the action. Thereupon the question arose what course he ought to take to revive as against himself the action which, as against the other defendants, had been tried and had failed. He elected to take this course: he made an application, treating the case as if the order transferring the action to the county court was void so far as he was concerned, and the action as against him could still be carried on in the High Court. He applied, as if nothing had happened, for an order that the plaintiffs should proceed with the action against him in the High Court, or that the action should be dismissed. The plaintiffs contended, by way of answer to that application, that the action was no longer in the High Court, and that that Court had, therefore, nothing to do with it. The administrator, on the other hand, contended that the order transferring the

action to the county court was not binding on him, and that, on his appearing on the scene, the High Court could treat the action as still surviving in the High Court as against him. The Divisional Court held that the action had been transferred to the county court, and that any proceedings by way of revivor must be taken in that court. The administrator, being dissatisfied with that decision, has appealed to this Court. The question therefore arises, whether the administrator is correct in contending that he is entitled to treat the order transferring the action as null and void, and to come to the High Court and ask to proceed as if no such order had been made. It seems to me, as I have said, that, as soon as the deceased defendant died, the action existed only as against the surviving defendants. There would be a right, no doubt, in the representative of the deceased defendant, if and when such a representative came into existence, to be made a party to the action; but, until he had constituted himself a party to the action, it was an action against the surviving defendants only. That being so, I am disposed to think that the order for transferring the whole action to the county court was properly made. If that be so, the proper course for the administrator of the deceased defendant would have been to make his application to the county court. But, assuming that not to be so, then it appears to me that the most he can say is that the order of transfer was irregular. I do not think that he can treat it as void. It seems to me, on that view of the case, that it was perfectly open to him, when he appeared on the scene as the representative of the deceased defendant, to rest satisfied with the order; or, on the other hand, if he was dissatisfied with it, he might at most seek to have it set aside on the ground that it was made at a time when there was no representative of the deceased's estate before the Court, and so might be to the prejudice of such estate. If he had this option, then it seems to me obvious that he must elect what he would do. At the most, therefore, he could treat the order as irregular; but he could not give it the go-by and treat it as void. He ought, on this view of the matter, to have applied to set the order aside before making any application that the action should proceed in the High Court. This is not a mere technicality, because, on an

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application to set aside the order, the Court might consider on what terms, if any, it should be set aside, whether there had been any undue delay in making the application, and what should be done with regard to the proceedings already had in the county court: so that considerations of justice, and not of mere technicality, may be involved in the question whether the order is void or merely irregular. The whole of the argument which has been addressed to us appears to rest on the preliminary illusion that, when one of several defendants dies, the action remains something more than an action against the surviving defendants, and still has some sort of shadowy existence as against the deceased defendant, and therefore that it cannot be dealt with as regards the other defendants without being at the same time dealt with as regards him. That notion appears to me to be fallacious. The truth is, that the action is gone so far as he is concerned, although no doubt there is a power, when a representative of his estate is appointed, of making such representative a party to the action. I am disposed, therefore, to think that the order transferring the action to the county court was rightly made; and certainly I think that the most which could be said against it was that it was irregular, and might be set aside on such terms as would do justice between the parties. For these reasons, I think that this appeal should be dismissed.

KAY, L.J. I am of the same opinion; and I must say that, as soon as the facts are apprehended, there appears to me to be no difficulty about the case. The present application seems to be based upon a complete misapprehension of the procedure and practice on the subject. When the deceased defendant died, the action survived against the other defendants in respect of the whole or part of the cause of action; but it was altogether dead as against the deceased. The only application which the representative of the deceased could make in regard to the action was such an application as he is now making. As matters stood, he was no party to the action, and nothing done in the action would affect him so far as the several liability of the deceased defendant was concerned. All that he was entitled to do was to apply

that the plaintiff should make him a party to the action, or else that it should be dismissed as regards him. That is the application which he makes; but he comes to the High Court to make that application after an order has been made transferring the action to the county court. The application seems to be based on the notion that some part of the action, some kind of shadowy apparition of the action, so far as it relates to the deceased, is still in existence and remains in the High Court. I cannot understand that notion. What was transferred to the county court by the order was the whole action. If any one says that that order was wrong, he must take steps to have the order set aside or varied so as to amend the wrong done. The appellant comes to the High Court and says, not that the order is wrong, but that it is void. How can it be void? The action has been transferred to the county court under it and has been tried there, and judgment has been given. If the appellant's contention is right, it amounts to this, viz., that, when one of several defendants dies in a case where there is joint and several liability, there can be no order to transfer the action till the action has been revived as against the deceased defendant's representative. That cannot be so. I have no doubt that this was a proper order, and that the only Court to which such an application as this could be made after that order was the county court. If the representative of the deceased defendant wished to have the action revived as against him or dismissed, he ought to have applied for that purpose to the county court under the county court rule to which our attention has been directed, and which appears to me to apply exactly to this case. It is a fallacy to suppose that an action can be divided, as the appellant suggests, and be half in one Court and half in another. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Crowders & Vizard.*
Solicitors for defendants: *Swepstone & Stone.*

E. L.

1893
April 28;
May 18;
July 11.

THE LONDON PROVIDENT BUILDING SOCIETY (In Liquidation) *v.* MORGAN and Another.

Building Society—Winding-up—Outside Creditors of Society—Advanced Members—Obligation to Repay Immediately the Future Instalments of Advance.

The respondents were advanced members of a building society, registered and incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42). By the terms of the deed of mortgage, on the security of which the advance to the respondents was made, the sum advanced together with the interest thereon was to be repaid by instalments spread over a period of twenty-one years. By one of the rules of the society, borrowers were at liberty to redeem their mortgages on giving a certain notice, the amount of the redemption money payable in such case being the total amount of the future instalments of principal and interest less a certain discount on all moneys paid in advance of the due dates. Before the expiration of the twenty-one years, and while the mortgage remained unredeemed, the society was ordered to be wound up. At the date of the winding-up there were outside creditors of the society:—

Held, that the respondents were liable to be placed on the list of contributories, and as such were compellable to pay immediately the future instalments of principal and interest provided by the mortgage deed, less the discount to which they would have been entitled upon a voluntary redemption under the society's rule in that behalf.

Appeal from an order of the City of London Court, ordering the names of the respondents, Elizabeth Morgan and James Morgan, to be removed from the list of contributories of the appellant society.

The society was one registered and incorporated in August, 1875, under the Building Societies Act, 1874 (37 & 38 Vict. c. 42). The shares were 10*l*. each. A resolution for voluntary winding-up was passed on September 23, 1892. By an order of the City of London Court, made on October 10, 1892, the winding-up was continued, but subject to the supervision of the Court. By the same and by a further order of the Court William Henry Pannell was appointed liquidator. There were outside creditors of the society. The society consisted, as is usual with such societies, of two classes of members, viz. (1.) members who held unadvanced shares, and (2.) advanced or borrowing members who had obtained advances on their shares and given mortgages to the society to secure repayment for such advances

in the manner provided by the rules of the society. The respondents, at the date of the liquidation, were holders of fifty advanced shares which had been allotted to them in 1891, and in respect of which they had executed in favour of the society a mortgage, dated August 22, 1891, of certain freehold property at Kentish Town and Holloway. The mortgage deed provided that in consideration of 500*l.* advanced to the respondents, the respondents would repay the same with interest by equal monthly instalments of 3*l.* 11*s.* 8*d.*, compounded of principal and interest during a period of twenty-one years. At the date of the winding-up of the society the instalments of the mortgage debt due up to that date had been paid by the respondents, but the larger portion still remained to be paid to the society in futuro. The liquidator placed the respondents in the list of contributories. The respondents applied in the City of London Court to have their names expunged from the list, and the judge acceded to the application. The society appealed.

The arguments sufficiently appear from the judgment.

Dodd, Q.C., and *T. Ribton*, for the appellants.

Muir Mackenzie and *Lincoln Reed*, for the respondents.

July 11. The judgment of the Court (Bruce and Kennedy, JJ.) was delivered by

KENNEDY, J. On the hearing of this appeal it was contended on the part of the appellant society that the respondents ought not to be held, as they were held by the learned judge of the City of London Court, to be debtors and not contributories; that they were not merely debtors under the mortgage deed, but liable as members to be called upon to contribute to the payment of the creditors of the society to the extent of the balance remaining unpaid under the mortgage deed; that the effect of the winding-up was to make that balance, calculated under the 43rd rule of the society (1) which provides for the redemption of mortgages,

(1) By rule 43, "Borrowers shall be at liberty to redeem their mortgages on giving six months' notice to the Board of their intention so to do, or without notice upon payment of three per cent. on the amount of the redemption money. The amount of redemption money payable in each case shall be the total amount of the future subscriptions, principal, pre-

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presently payable, and that it was just and right that in respect of the liability for the amount of the unpaid balance, the respondents' names should be retained on the list of contributories.

For the respondents on the other hand it was contended that the relation of the respondents to the society was that of debtors under a contract to pay the debt by instalments in accordance with the terms of the mortgage deed, and not that of members liable to contribute; that their liability was confined to the obligation to pay in the mode and at the times prescribed by the mortgage deed, and could not be altered by the winding-up; that the fact of the existence of outside creditors of a society could not affect the bargain contained in the mortgage deed; and they relied especially upon the judgments in the *Scottish Property Investment Company Building Society* v. *Boyd* (1); *In re Middlesbrough, Redcar and Saltburn Building Society* (2); and *In re Britannia Permanent Benefit Building Society.* (3)

It is not, I think, necessary in this case to refer in detail to the rules of this particular society. They appear to be in what may be called the ordinary form. There is in rule 43 the usual provision for the redemption of his security by an advanced member; and I may note, although the consideration does not affect my judgment in this case, that the right to share profits appears, in the case of this society, to be confined to the unadvanced members. It appears to me that the legal position of the respondents, as advanced members of this society, is this: In the first place they are not merely debtors to the society. "An advance under the statute, and under these rules," said Lord Watson in *Brownlie* v. *Russell* (4), "does not mean a loan by the society upon the security of the shares; it signifies this, that the society pay to the member by anticipation the amount of his shares upon receiving in return certain considerations which are fixed by the rules." So long as this

miums and interest, engaged to be paid together with all arrears, fines, and charges, less a discount to be estimated by the society's actuary of not less than three per cent. per annum on all moneys paid in advance of the dates when they would have become due under the mortgage contract or the society's rules."

(1) 12 Court Sess. Cas. 4th Series (Rettie), 127.

(2) 58 L. J. (Ch.) 771.

(3) 65 L. T. 196.

(4) 8 App. Cas. 235, at p. 256.

society was a going concern, the society could claim no more in the shape of payments than the society had stipulated for in the indenture of mortgage made under the rules, and upon completion of the stipulated payments, as and at the times fixed by the mortgage deed, or upon redemption of the mortgage under rule 43, the respondents were entitled to say that they had discharged all their liabilities as members. Sect. 14 of the Act of 1874 prescribes that "The liability of any member of any society under this Act . . . . in respect of any share upon which an advance has been made shall be limited to the amount payable thereon under any mortgage or other security, or under the rules of the society." But a winding-up supervenes. What is the position of the respondents then?

It seems to me, looking at s. 14 of the statute and at the authorities, to be clear, in the first place, that in a case such as this, where there are outside creditors, the liquidator is right in placing the advanced shareholders who have not redeemed upon the list of contributories. Their liability under the mortgage and under the rules remains in large measure undischarged. They have not redeemed their security. They are entitled to do so still, and if they do so their liability will be extinguished; but until this is done (at all events, while any outside creditors remain unpaid) they are properly included in the list. The decision of Lord Hatherley (then Page Wood, V.C.) in *In re Doncaster Permanent Building Society* (1) appears to me to be a distinct authority in point. It is true that the society in that case was not a society under the Act of 1874, but I do not see that this point affects its applicability. "A call" says Lord Hatherley (at p. 170), "having been now made upon all the members of the society alike, the appellants (advanced shareholders) seek to escape. There is no doubt they were members for the purpose of paying the debts, and therefore it was proper and right that they should be made contributories and it was upon that ground that they were settled upon the list. But when that has been done, and the question is solely between the members of the society standing upon the same rights and liabilities, inter se, as if there had been no winding-up at all, and when the advanced

(1) Law Rep. 3 Eq. 158.

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shareholders have actually advanced their subscriptions to the end of fourteen years (which was the limit in that case, as twenty-one years is here) and thus discharged their liabilities, I feel no difficulty as to the question of fairness as between all the advanced shareholders and the rest, and I must expunge the call so far as it relates to the advanced members."

In the next place, and this is the point which was keenly contested in the course of the argument, I think that it is equally clear that the effect of the winding-up in this case is to compel the respondents to repay presently the amount which is still due upon the advances, so that the sum in respect of which the respondents are liable to contribute is the amount of the instalments of principal and interest provided for by the mortgage deed and still unpaid, regard being had in its calculation to the terms of redemption provided by rule 43. It appears to me that this is the fair result of the two cases in the House of Lords, to which much reference was made: *Brownlie* v. *Russell* (1), and *Tosh* v. *North British Building Society.* (2)

In the first of those two cases the society was, as this society was, registered under the Act of 1874. It was being wound up, and the questions, in brief, were: (1.) As to the extinction of the advance pro tanto by the amount of the instalments paid before the winding-up by the advanced member; and (2.) As to his right to redeem. It was held that as to (1.) there had been such an extinction, and as to (2.) that from and after the date of the winding-up order he had a right to redeem his security by paying to the liquidators the difference between his advance and his instalments, with interest added thereon, as against excess of interest with which he had been charged, and on payment of such difference, with interest thereon, he was entitled to be relieved of all further liability as a contributory or otherwise. It appears to me that it is impossible to read the judgments in *Brownlie* v. *Russell* (1), and especially those of Lord Watson and Lord Bramwell, without seeing that in their view, although, as the advanced member sought to redeem, this was not directly a point for decision, the winding-up order operated (in the language of Lord Herschell, in *Tosh* v. *North British*

(1) 8 App. Cas. 235. (2) 11 App. Cas. 489.

Building Society (1), to which I will refer presently) as a kind of compulsory withdrawal, and compelled the present discharge of the liability which, under the mortgage deed of the advanced member, would be discharged by instalments. In *Brownlie* v. *Russell* (2), Lord Bramwell says: "It seems to me clear that this winding-up, which is really a matter between the members of the society, can make no difference in their substantial rights inter se. It may make, and doubtless will make . . . . this difference, that that which had to be paid at distant times will have to be presently paid, and that which would have been received at distant times will be presently received if there are assets wherewithal to satisfy it." In the later case of *Tosh* v. *North British Building Society* (1) (not a society under the Act of 1874), it was decided in accordance with *Brownlie* v. *Russell* (3), that the borrowing members are entitled to have their securities discharged in the terms of the rules, and are not bound to remain members and bear a share of the losses incurred by the society. There were no outside creditors. In the course of his judgment, Lord Herschell, who (I may remark) was one of the counsel who argued in *Brownlie* v. *Russell* (3), says, at page 503, in regard to that decision: "It was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society, and compelled them to repay the amount which was still due upon their advances, but did not substantially alter their position, or their rights, or render them at all different from what they would have been if they had been withdrawing under the rules." And it is, I think, worth noting in regard to the opposition of the respondents to the operation of the "compulsory withdrawal," that one of the points for appeal in regard to Finlay, one of the appellants in the case last cited, was that he was not bound, as he had been held to be by the Court below, to make payment presently, but had the option to pay by instalments; and on appeal, this point having been withdrawn at the bar, Lord Herschell remarks, at page 505, that it was "wisely abandoned."

(1) 11 App. Cas. 489. (2) 8 App. Cas. at p. 259.
(3) 8 App. Cas. 235.

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It is, indeed, as it appears to me, difficult to see how the winding-up could be effected, if the view of the respondents were to prevail, for that view would necessitate the keeping open of the liquidation until the termination of the twenty-one years period fixed by the mortgage; in other words, until the year 1912. The suggestion made on their behalf that the liquidator might sell the society's right to receive the monthly instalments of 3*l.* 11*s.* 8*d.*, and interest, as provided by the deed, appears to me not to afford a practical solution of the difficulty. It is urged by them, and I do not dispute the possibility, that the view which seems to me to be the true one may inflict a hardship upon the advanced member, by compelling him to raise, by borrowing or otherwise, the amount necessary to discharge the indebtedness, the discharge of which would, but for the winding-up, be spread over a long term of years. I do not suppose that the contingency of a winding-up was present to the respondents' minds when they were led by the statement of advantages set forth in the prospectus to enter into the transaction. They cannot on that account escape from the incidents of membership. A similar kind of hardship, though less in degree perhaps, was involved in the judgment of Kekewich, J., in *In re Cordova Union Gold Co.* (1), which decided, in accordance with the law laid down by Lindley, L.J., in *In re Pyle Works* (2), that the contract for payment by instalments was determined by the winding-up, and that the liquidator was, under the provisions of the Companies Act, 1862, entitled to make an immediate call for the amount remaining unpaid in respect of the shares. When a company or a building society is being wound up, and there are outside creditors to be paid, the liquidator both can and must collect the assets for the purpose of paying them; and as I understand the law in regard to those provisions of the Companies Act which apply alike to a company registered under those Acts and to the building society incorporated and registered under the Building Societies Act, 1874, stipulations in the contract between the corporate body and its members regulating the time and mode in which the liabilities of membership are to be discharged—valid and binding though they are during the life of the corpo-

(1) [1891] 2 Ch. 580. (2) 44 Ch. D. 534, at page 583.

rate body—are not permitted to interfere with the work of liquidation, when the corporate body is being wound up, see per Lindley, L.J., in *In re Pyle Works* (1), and per Kekewich, J., in *In re Cordova Union Gold Co.* (2), I will only add, as an alleviation of the suggested hardship in this case, although it is not necessary for us now to decide the point, that I am disposed to think that the liquidator, before he can enforce against the respondents a claim to payment of the unpaid balance, will have to give them a six months' notice which, if they had sought to redeem, they would have to give under the 43rd (the redemption) rule of the society.

I do not think that in holding that the respondents' names should be retained upon the list of contributories we are deciding anything contrary to the decisions which I have mentioned as being relied upon by the respondents; viz., *In re Middlesbrough, Redcar, and Suburban Building Society* (3), before Stirling, J.; *In re Britannia Permanent Benefit Building Society* (4), before Kekewich, J. (in which that learned judge based his judgment on *Brownlie* v. *Russell* (5) and the *Middlesborough Society's Case* (3)) and the Scotch case of the *Scottish Property Investment Company Building Society* v. *Boyd.* (6) In none of those cases, so far as appears from the reports, were there any outside creditors unpaid. Indeed, in the case before Stirling, J., there were surplus assets in which the counsel for the advanced shareholders expressly waived any right to participate. For the reasons which I have stated I have come to the conclusion that the decision of the learned judge of the City of London Court was wrong, and that the appellant is entitled to the order asked for by his counsel, namely, that this Court, being of opinion that from and after the date of the winding-up order the respondents as advanced members were liable to pay to the society such sum as would under the rules of the said society, the instalments already paid by them in respect of the said advance being taken into account, entitle them to call for a redemption of their

(1) 44 Ch. D. 534, at p. 583.
(2) [1891] 2 Ch. 580.
(3) 58 L. J. (Ch.) 771.
(4) 65 L. T. 196.
(5) 8 App. Cas. 235.
(6) 12 Court Sess. Cas. 4th Series (Rettie), 127.

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security, and that on payment of such sum the respondents will be free from all liability as contributories or otherwise of the said society or the liquidator thereof, the order of the Court below removing the respondents' names from the list of contributories is to be discharged.

Appeal allowed.

Solicitors for appellants: *Lee & Davis.*

Solicitors for respondents: *Hatchett-Jones, & Co.*

J. F. C.

C. A.

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June 30.

[IN THE COURT OF APPEAL.]

BENTSEN *v.* TAYLOR, SONS & CO. (2).

Ship—Charterparty—Breach—Condition precedent or Warranty—Waiver.

A charterparty, dated March 29, between the plaintiff, a shipowner, and the defendants, described the ship as "now sailed or about to sail from a pitch pine port to the United Kingdom," and provided that the ship should, after discharging homeward cargo, proceed to Quebec, and there load a cargo of timber, and being so loaded should therewith proceed to Greenock, Barrow, or Liverpool, as ordered on signing bill of lading, and deliver the same on being paid freight. At the date of the charterparty both parties knew that the ship was, or had just been, at Mobile, in America, loading a cargo of timber, which she was to carry to Greenock. She did not, in fact, sail from Mobile until April 23. On May 16, the defendants were aware of the date of the sailing, and they then wrote to the plaintiff's brokers, asking if they had any proposal respecting the charter. No proposal was made by the plaintiff, and on June 5 the ship arrived at Greenock. Further correspondence took place, and ultimately the defendants, on June 16, wrote to the plaintiff's brokers, "If you send the ship to load under our charterparty we shall protest against loading and difference of freight and insurance upon goods then shipped."

The ship sailed from Greenock on June 18, and after she had arrived at Quebec, the defendants refused to load her:—

Held, that the description of the ship as "now sailed or about to sail," was of the substance of the contract; that it was a condition precedent and not a mere warranty; and that on breach of the condition the defendants would have been entitled to repudiate the contract:

But, *held*, that the conduct of the defendants, and in particular the letter of June 16, amounted to a waiver of such right to repudiate the contract, and that they were liable for the freight under the charterparty, but were entitled as against the plaintiff to such damages as they could prove that they had sustained by reason of the breach of the condition.

MOTION by the plaintiff for a new trial of the action, or that judgment might be entered for him.

At the trial before Pollock, B., it appeared that the action was by the owner of a vessel, called *Folkvang*, against the charterers, for breach of the charterparty in refusing to load the ship.

By the charterparty, dated March 29, 1892, it was mutually agreed between the plaintiff, "owner of the good ship or vessel called the *Folkvang*, now sailed or about to sail from a pitch pine port to the United Kingdom," and the defendants, "that the said vessel, being tight, staunch, and strong, and every way fitted for the voyage, shall, after discharging homeward cargo, with all convenient speed, sail and proceed to a good and safe loading place as may be directed by charterers at Quebec, or as near thereto as she may safely get always afloat, and there load from the factors of the said merchants a full and complete cargo of wood goods" as therein described, "and being so loaded, shall therewith proceed to Greenock, Barrow, or Liverpool, as ordered on signing bill of lading," and deliver the same on being paid freight as therein mentioned. At the time when the charterparty was signed it was known to both parties that the ship was, or had just been, at the port of Mobile, in America, loading a cargo of timber for Greenock. She did not in fact sail from that port on her voyage to Greenock until April 23, 1892. By May 16, 1892, the defendants were aware of the delay in the sailing of the ship, and they wrote to Lietke & Co., the ship's brokers, as follows:—

"*Folkvang*.—Our attention has been called to a reported sailing homewards of this ship dated 24th April, whereas, under our charterparty she is warranted as 'sailed or about to sail on 29th March.' What is her correct position? If April 24th is the sailing, have you any proposal respecting the charter?"

No proposal having been made in answer to this letter, the defendants, on June 4, 1892, wrote again to Lietke & Co.:—

"*Folkvang*.—We still await the owner's answer to our letter, and please let us have it."

On June 6, Lietke & Co. replied:—

"*Folkvang*.—Your memo. of 4th inst. to hand, and in reply we, as advised you, have written owner, but have no advice from him as yet. We had, however, this morning the pleasure of

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wiring you ship's safe arrival at Greenock, where she will get quick despatch."

The ship had arrived at Greenock on June 5.

On June 16 the defendants wrote to Lietke & Co.:—

"*Folkvang.*—We are still without any reply to ours as to this ship's wrongful description. You must therefore clearly understand that, if you send her out to load under our charterparty, we shall protest against loading, and difference of freight and insurance upon goods then shipped."

On June 18 the ship sailed for Quebec, and on June 20 Lietke & Co. wrote to the defendants:—

"*Folkvang.*—Having heard nothing from you, and wiring you this vessel's arrival at Greenock, we considered this matter at an end, and consequently did not forward you owner's reply.

"In our respects of 23rd March last we stated vessel as now being in Mobile, which was perfectly correct, having arrived there fully a month previously, and regarding which you, no doubt, also satisfied yourself by looking up Lloyd's list before chartering vessel. We can, consequently, not admit wrongful description, and beg to inform you that vessel left Greenock on Saturday for Quebec, to complete her charter."

On June 21 the defendants replied:—

"We note yours of yesterday. We repeat that we consider a vessel stated on the 29th March to be 'sailed or about to sail,' and which does not sail till the end of April, to be wrongly described. It appears from owner's letter that the ship did not finish loading until twenty-four days after she was described to us as 'sailed or about to sail.'

"You must please accept our notice, and give owner advice of our intention to load under protest, claiming damages for freight and increased insurance."

The ship arrived at Quebec on August 7, and shortly afterwards the defendants refused to load her. This action was then brought. The jury, in answer to questions put to them by the learned judge, found (1.) that the description of the ship was not substantially true; (2.) that the description was a substantive part of the contract; (3.) that the defendants did not waive their right to insist on this. Upon these findings a verdict

was given for the defendants, and judgment was entered for them.

Pyke, Q.C., and *Hodges*, for the plaintiff. The description of the ship as "now sailed or about to sail" is not a condition precedent to the performance of the contract by the defendants. A condition must be expressed in clear and unambiguous terms. Here the words are too vague to constitute a condition; they amount to no more than a warranty, the breach of which by the plaintiff may entitle the defendants to damages. But they are not entitled to repudiate the contract: *Behn* v. *Burness* (1); *Davidson* v. *Gwynne* (2); *Tarrabochia* v. *Hickie* (3); *Constable* v. *Cloberie* (4); *Clipsham* v. *Vertue* (5); *McAndrew* v. *Chapple* (6); *Corkling* v. *Massey*. (7) Even if the words amounted to a condition, the defendants have waived its performance. As soon as they became aware of the breach—and they were aware of it on May 16—they ought, if they meant to insist on the condition, to have informed the plaintiff that they did not intend to perform the contract. Instead of doing that, they allowed, or even induced, the plaintiff to send the ship out to Quebec, in the belief that they intended to load her there. The defendants' letters amounted to a waiver of the condition, and they were not justified in refusing to load the ship.

Bigham, Q.C., and *T. G. Carver*, for the defendants, were called upon only as to the question of waiver. The plaintiff was never ready and willing to give the defendants that for which they bargained, and the defendants never entered into a new contract. When the defendants discovered that the ship had not sailed till April 23, they were not bound to do anything. The defendants did not affirm the contract after they knew of the breach of the condition. The question of waiver was really a question of fact for the jury. The defendants did not insist on the ship going out. The true test is, whether the defendants, after knowing of the breach, treated the charter as still subsisting: *Dixon* v. *Heriot*. (8) They did not do this.

(1) 3 B. & S. 751, 757.
(2) 12 East, 381.
(3) 1 H. & N. 183.
(4) Palm. 397.
(5) 5 Q. B. 265.
(6) Law Rep. 1 C. P. 643.
(7) Law Rep. 8 C. P. 395.
(8) 2 F. & F. 760, 763.

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LORD ESHER, M.R. The Court has to determine the question whether the statement in this charterparty is a condition or a warranty. In the charterparty the ship is described as "now sailed or about to sail from a pitch pine port to the United Kingdom." The question we have to determine is, whether that description amounts to anything more than a representation of a fact, and, if it does, whether it amounts to a condition precedent or only to a warranty. In order to construe the words the Court has a right to know what were the facts existing at the date of the contract. If there is any doubt about the facts, it is for the jury to determine upon the evidence what they were, and, when they have done this, it is for the Court to construe the contract. The only thing which appears to have been in doubt in the present case was, what did the parties mean by their contract, and that question was unfortunately left by the judge to the jury. The only material fact was, as it seems to me, that both parties knew that the ship had gone to Mobile, where she was to load a cargo of timber which she was to bring to the United Kingdom. Both parties knew that the ordinary time for loading a timber cargo at Mobile was about a month, and the plaintiff calculated that the ship was already loaded, and had sailed; or that, if she were not actually loaded, she would be so in a day or two, and would then immediately sail. Knowing these facts, what do the words "now sailed or about to sail" represent to the charterers? To say that a ship "has sailed" is obviously to represent that she has done so. To say that she is "about to sail" is to represent either that she is loaded and just about to sail, or that, if she is not already loaded, she will be loaded in a day or two, and will then sail. Taken in connection with the first words "now sailed," it seems to me that the words "or about to sail" amount to a representation that the ship is just ready to sail. Is it, then, a mere representation? A knowledge of the place where the ship is is material, in order that the charterer may know when she is likely to come to him. It is material as informing him what sort of a voyage it is which she will have to make, and how long a time is likely to elapse before she comes to him. In the present case the place where the ship was is not stated in the charterparty; but both parties knew that

she was, or had just been, at Mobile. It appears to me impossible to say that the statement that the ship was "about to sail" was a mere representation. It was inserted for a purpose, in order that the charterers might know when the ship was likely to arrive at the port in Great Britain. The statement was, I think, a substantive part of the contract. Was it a condition precedent? It is for the Court to determine whether it was a mere representation, or whether it formed part of the contract. The case of *Behn* v. *Burness* (1) supplies a canon of construction. In my opinion, the present case falls within the canon there laid down. The statement is a substantive part of the contract, and we ought to hold it to be a condition precedent, unless we can find in the contract itself or the surrounding circumstances anything to lead us to a contrary conclusion. To my mind, it is clearly a condition precedent, and there is nothing on which any one can rely as a reason for saying that it is not. The meaning of the statement is, that the ship has either loaded her cargo and has sailed, or that she is nearly loaded and will sail forthwith. In fact she was not nearly loaded, and she did not sail forthwith. She did not sail till nearly a month afterwards, and there was a breach of the condition. The defendants had then a right to treat the contract as at an end, or they could, if they chose, treat it as still subsisting. But, if they intended to treat the contract as at an end, it was their duty so to exercise their right as not to lead the plaintiff to believe that he was still bound by the contract. Was the plaintiff led by the defendants to suppose that he was still bound? The defendants' letters, to my mind, clearly come to this: "You, the plaintiff, are bound to send the ship out to Quebec, and we shall load her there; but we shall do so under protest—that is, we shall claim damages from you for breach of contract." No reasonable man can say that the plaintiff was not told by the defendants that he was still bound by the contract. The defendants cannot, therefore, now treat the contract as at an end; but they have a right to claim damages from the plaintiff, if they can prove that they have sustained any by reason of the delay in the sailing of the ship from Mobile. The question of the amount of the damages will be

(1) 3 B. & S. 751.

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referred to an arbitrator, in accordance with the agreement which, we are told, has been made between the parties. The plaintiff is entitled to judgment on the claim for the freight under the charterparty, and the defendants are entitled to judgment for damages for the breach of contract. There will be a set-off, and execution for the difference and costs will be given in the ordinary way.

BOWEN, L.J. I am entirely of the same opinion. The first question we have to consider is, What is the true effect and meaning of the words in the charterparty, "now sailed or about to sail to the United Kingdom"?

The law as to the construction of contracts, and especially of charterparties, in reference to conditions precedent, and in reference to all representations made in the contract, or at the time when it is entered into, is, I think, clear. When a contract is entered into between two parties, every representation made at the time of the entering into the contract may or may not be intended as a warranty, or as a promise that the representation is true. When the representation is not contained in the written document itself, it is for the jury to say whether the real representation amounted to a warranty, and the jury are always in such a case directed to find whether the representation amounted to a warranty, and whether it was so intended by the parties. But, when you have a representation made in a written document, it is obviously no longer for the jury, but for the Court, to decide whether it is a mere representation, or whether it is what is called (I admit not very happily) a "substantive part of the contract," that is, a part of the contract which involves a promise in itself. It might be necessary to take the opinion of the jury on matters of fact which would throw light on the construction, but the question of construction itself would remain until the end of the case for the Court to decide. But, assuming the Court to be of opinion that the statement made amounts to a promise, or, in other words, a substantive part of the contract, it still remains to be decided by the Court, as a matter of construction, whether it is such a promise as amounts merely to a warranty, the breach of which

would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract.

Of course it is often very difficult to decide as a matter of construction whether a representation which contains a promise, and which can only be explained on the ground that it is in itself a substantive part of the contract, amounts to a condition precedent, or is only a warranty. There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. There, again, it might be necessary to have recourse to the jury. In the case of a charterparty it may well be that such a test could only be applied after getting the jury to say what the effect of a breach of such a condition would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract.

It was by the application of that train of reasoning that the Court in *Behn* v. *Burness* (1) appears to have come to the conclusion, that if a ship, which at the date of a charterparty is in foreign parts, is chartered to come to England, a statement of the place where she is ought primâ facie to be construed as a condition precedent. And the Court gave this reason (2) for that, because they say, "The place of the ship at the date of the

(1) 3 B. & S. 751, 757. (2) 3 B. & S. at p. 759.

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contract, when the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading." In other words, the non-accuracy of such a statement is likely to affect the very foundation of the adventure, because its inaccuracy would displace the only basis, or one of the chief bases, of the calculation on which the parties would act. It is obvious that when you are dealing with a voyage, the contemplated date of its commencement may be of the utmost importance. Having regard to the time of the year at which it is intended to prosecute the voyage, delay in its commencement, if it is protracted beyond a certain point, may in many cases be so vital a matter as to render the voyage impossible, or the risk may be so much increased as to make it no longer possible to have a voyage of the same kind. That is the ground on which it was decided in *Behn* v. *Burness* (1) that, the place of the ship at the date of the charter being the only or main basis on which the charterer can found his calculation of the time of her arrival, a statement in reference to her place ought to be construed as a condition precedent, unless there is to be found in the contract itself, or in the surrounding circumstances, reason for thinking that the parties did not so intend.

Now, if that is true as regards the place of a ship which is in foreign parts and is chartered to come to England, the same train of reasoning ought to apply to the time at which a ship is stated to have sailed, or to be about to sail, from the place at which she has been loading, unless the language be so vague as to lead anyone to suppose that it was not intended to be a condition precedent. I quite agree that the vagueness or ambiguity of the statement is one of the elements which would influence the Court very much in deciding whether the parties intended that the statement should be a promise the fulfilment of which was to be a condition precedent.

That drives us to consider, what is the real meaning of these words. Is there anything in them so vague or so ambiguous that they cannot fairly be treated as a statement of a condi-

(1) 3 B. & S. 751.

tion precedent? I agree that a condition precedent ought to be clearly expressed. The statement is, that the ship "has now sailed or is about to sail." Having regard to what we have heard of the history of the port of Mobile, I have not the slightest doubt that, if that statement does not mean that the ship has actually sailed, it does mean that she is loaded, or may at all events for business purposes be treated as actually loaded; that she has got past the embarrassments and dangers attendant on loading, and that her sailing is the next thing to be looked for. And, with regard to the suggested ambiguity in the phrase "about to sail," when it is read in conjunction with the other words, it seems to me clear that it does not mean that the ship is to sail within a "reasonable" or indefinite time, a statement which might lead to endless difficulties and expense, but that, if she has not already sailed, she is about to sail forthwith. If that is so, then applying the reasoning which lies at the root of *Behn* v. *Burness* (1), I have no hesitation in saying that I believe the phrase to be a condition precedent. It is a representation the accuracy of which is made a condition precedent, though I do not doubt that the fulfilment of a promise may be equally made a condition precedent. If that is so, there is an end of the first point in the case. The appellant is clearly in the wrong as to that.

But then comes the question, Is not the appellant right in saying that the jury could only reasonably draw one inference from the correspondence between the parties, namely, that the condition precedent had been waived by the defendants? In order to succeed, the plaintiff must shew, either that he has performed the condition precedent, the onus being on him, or that the defendants have excused the performance of the condition, and we have to consider whether the plaintiff has sustained that burthen, so that no reasonable man could doubt that there has been a waiver of the condition or an excuse of its performance. In other words, did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent, but that they only

(1) 3 B. & S. 751.

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intended to rely on the misdescription as a breach of warranty, treating the contract as still open for further performance? Did the defendants lead the plaintiff to believe that they intended to treat the misdescription as a breach of contract only, and not as a failure to perform a condition precedent? As soon as you state the case in that way, looking at the facts, the letters which passed before the vessel left for Quebec can only be treated by business men as amounting to an intimation by the defendants to the plaintiff that, although they would insist on treating the contract as broken, by reason of the non-fulfilment of the promise that the ship was ready to sail from Mobile immediately, they did not intend to rely upon that as a failure of a condition precedent, but only as a breach of warranty. In my opinion, the plaintiff has sustained the burthen which lay on him to prove a waiver of the condition, and therefore this appeal ought to succeed, and the judgment ought to be entered in the way which the Master of the Rolls has suggested.

KAY, L.J. I am of the same opinion, and I will add very little upon the construction of the charterparty. It is quite plain that the words "now sailed or about to sail" were very material words. The charterparty contemplated a voyage to be made by a ship, which was then at Mobile, to the United Kingdom, and from thence to Quebec, where she was to load a cargo of timber for the United Kingdom. The only mode in which, or at any rate the principal datum by means of which, the charterers could ascertain at what time the ship was likely to arrive in England and get back to Quebec, was the statement of the time at which she had left or would leave Mobile, and that statement was made in the words, "now sailed or about to sail." They were very important words, and, in my opinion, they are in no way ambiguous. They mean either that the ship was already at sea, or that she was on the point of sailing—almost ready to start. If it were necessary to decide this point, I should be of opinion that these words amounted to a condition rather than to a mere warranty. But it is not really necessary to decide the point, for, if there was a condition precedent, I have no doubt as to the waiver. The ship did not leave Mobile till April 23, and

there can be no doubt that, whether there was a condition precedent or a mere warranty, there was a breach of it. On May 16 at the latest the defendants were aware of the breach. The ship arrived at Greenock on June 5, and she sailed again for Quebec on June 18, and arrived there on August 7. Meanwhile, the defendants, being perfectly aware of the breach of the condition or warranty, had written the letter of June 16 to the plaintiff's brokers. I have no doubt that that letter would convey to those who received it this meaning: "If you send the ship out to Quebec we shall load her there, but we shall claim from you the difference in the amount of freight and insurance premium upon the goods then shipped." The refusal of the defendants to load the ship was not communicated to the plaintiff till August 12. If the defendants had by their conduct allowed the plaintiff to believe that the ship was to go out to Quebec, notwithstanding the breach of the condition, I should think that their conduct would have amounted to a waiver of the condition. But, in my opinion, the defendants certainly induced the plaintiff to believe that they wished the ship to go out, and that when she arrived at Quebec they would load her with a cargo of timber, and that they intended to treat the words "about to sail" in the charter-party, not as a condition precedent, but only as a warranty for the breach of which they would claim damages from the plaintiff. I feel no doubt that the letter of June 16 amounted to a distinct waiver of the condition, and that the subsequent refusal of the defendants to load the ship was a wrongful act for which they are liable to the plaintiff.

Application granted accordingly.

Solicitors: *Irvine, Hodges, & Borrowman; Wynne, Holme, & Wynne, for Simpson, North & Co., Liverpool.*

W. L. C.

C. A.
1893
June 6, 7.

[IN THE COURT OF APPEAL.]

IN RE ROMER & HASLAM.

Solicitor—Bill of Costs— Taxation—Series of Bills treated as one—Payment by giving Negotiable Security.

Where a solicitor is retained to conduct litigation, other than an ordinary action at common law, which may extend over a considerable period of time, and in which breaks may occur of such a kind as to be equivalent to the conclusion of a definite and distinct part of the proceedings, he may deliver to his client a bill of costs for business done up to the occurrence of any such breaks in the litigation, and demand payment. Where, however, in the course of the proceedings several bills of costs have been sent in at different times by the solicitor, it is always a question of fact whether they were sent in as final bills for work done up to the occurrence of any such break in the litigation, so as to be separate bills and therefore not liable to taxation after the lapse of twelve months, or whether they were merely statements of account or portions of one entire bill, so as to make the whole liable to taxation if the last part has been delivered within twelve months of the application to tax.

Semble, that the making of an award and its remission to the arbitrator for reconsideration may be treated as breaks in protracted arbitration proceedings, upon the occurrence of which the solicitor may send in such a bill of costs to his client as to amount to a separate bill.

The handing by a client to his solicitor of a negotiable security for the amount of his bill of costs, coupled with the giving of a receipt by the solicitor in which it is expressed to be taken "in settlement" of his bill, does not amount to payment in the event of the negotiable security being dishonoured, unless there be proof (the onus of which lies on the solicitor) that such was at the time the intention of the parties, and that the client was aware of the effect of the transaction upon his right to tax the bill of costs.

APPEAL from a decision of Mathew, J., at chambers, ordering taxation of certain bills of costs.

From the affidavits used upon the application, it appeared that Mr. Romer, and subsequently Messrs Romer & Haslam, had acted as solicitors for Messrs. H. De Morgan Snell & Co. in various matters, and in particular in certain arbitration proceedings between them and the Rio de Janeiro Flour Mills and Granaries, Limited, which lasted about two years. The matter in dispute in the arbitration was the amount payable to Messrs. Snell & Co., as the contractors for the building of the Rio de Janeiro Flour Mills, and the first hearing, which lasted twenty-eight days, came to an end on June 21, 1890. On

March 17th, 1891, the arbitrator made his award; but an application was made to the Queen's Bench Division by the company to set aside or remit the award; and on June 27, 1891, it was sent back to the arbitrator in order that he might state certain points of law raised by the company for the opinion of the Court. The arbitrator did not alter his award, but stated certain facts so as to raise the necessary points of law; and, on November 30, 1891, judgment was given in favour of the company on the points of law raised, and the case was again remitted to the arbitrator for the purpose of dealing with the costs of the arbitration. In February, 1892, an appeal by the contractors to the Court of Appeal was dismissed; and, in May, 1892, the arbitrator made a final award that each party should pay his own costs of the arbitration.

The facts relating to the bills of costs sent in by Messrs. Romer & Haslam to Messrs. Snell & Co. were shortly as follow. On August 30, 1890, the first bill was sent in for business done down to June 30, 1890; the amount charged in respect of the arbitration proceedings was 4087*l.* 13*s.*, and 108*l* 15*s.* 4*d.* was charged in respect of other matters. It was accompanied by a cash account in which all payments on account were credited, and which shewed a balance due to the solicitors of 1221*l.* 8*s.* 4*d.* On July 14, 1891, the second bill was sent in for business done down to June 30, 1891; the amount in respect of the arbitration was 517*l.* 2*s.* 3*d.*, and a further sum of 485*l.* 10*s.*, being half the arbitrator's fees; the charge in respect of general business being only 5*l.* 10*s.* The accompanying cash account brought down the debit balance of 1221*l.* 8*s.* 4*d.* from the previous account, and after giving credit for payments shewed a debit balance of 1435*l.* 12*s.* 6*d.* The third bill was sent in on January 26, 1892, for work done down to December 31, 1891, and the total amount (860*l.* 5*s.* 9*d.*) was wholly in respect of work done in the arbitration proceedings. The cash account, which was treated in the same way as the others, shewed a debit balance of 1445*l.* 18*s.* 3*d.* (1)

(1) The cash account originally sent in with the third bill shewed a debit balance of 1695*l.* 18*s.* 3*d.*, owing to an omission to credit the clients with a payment of 250*l.* on account; but on the attention of the solicitors being called to the mistake, an amended cash account was sent in.

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The fourth and last bill was sent in on July 12, 1892, for work down to June 30, 1892; the charges in respect of the arbitration were 389*l.* 13*s.* 2*d.*, with a further sum of 41*l.* 15*s.* for arbitrator's fees; the cash account shewed a debit balance of 1835*l.* 11*s.* 5*d.* Each of the bills was accompanied by a letter from the solicitors: those sent with the first and third bills contained no request for payment or money on account; that sent with the second bill contained an intimation that a cheque for 500*l.* would be esteemed a favour; and that sent with the fourth bill asked for a cheque on account.

The money of Messrs. De Morgan Snell & Co. being locked up in Brazil, an arrangement was come to with Messrs. Romer & Haslam on July 20, 1892, by which eight bills of exchange were given for the amount of the balance, four for 144*l.* 5*s.* 8*d.*, and four for 313*l.* 12*s.* 2*d.*, one bill of each amount being made payable at three, six, nine, and twelve months' date respectively, and a receipt in the following form was indorsed on the last cash account and signed by the solicitors: "Received the above-mentioned sum in settlement by acceptances;" the indorsement "Paid by bills payable" was also placed on the same account by the representative of Messrs. De Morgan Snell & Co. The two bills falling due on October 23, 1892, were met at maturity, but those falling due on January 23, 1893, were dishonoured; and judgment against Messrs. De Morgan Snell & Co. was subsequently obtained in an action upon them by the holder with whom they had been discounted by the solicitors; the others had not matured at the date of the application for taxation, which was made on the ground that the bills of costs contained overcharges. Mathew, J., made an order for taxation, and the solicitors appealed.

R. M. Bray, for the solicitors. These bills of costs are not to be treated as one continuous bill, but as separate bills, with the result that, in the absence of special circumstances, the first three are not taxable, they having been delivered more than twelve months before the application for taxation. The old common law rule that the retainer of a solicitor to conduct an action for his client constitutes an entire contract, so as to

deprive the solicitor of his right to send in a bill of costs, except for out-of-pocket expenses, until judgment in the action, is limited to common law actions, and has been held by Jessel, M.R., not to apply in such matters as a bankruptcy, an administration, or a winding-up, where the proceedings may last for years before coming to a conclusion: *In re Hall and Barker.* (1) This decision has been approved in *In re Nelson, Son, and Hastings* (2), where the facts were very similar to those in the present case, and where it was held that bills of costs delivered periodically during seven years by London solicitors to a country solicitor for whom they acted as agents could not be treated as one continuous bill, although one of the actions in respect of which charges were made ran through the whole of the bills, and cash accounts were delivered with each of the bills shewing the balance from time to time due from the country solicitor. The general rule to be collected from the decisions seems to be that unless in a given case there is some special reason for treating a succession of bills as one continuous bill, they will not be so treated. In the present case, there is no such reason, and the presumption is entirely the other way; for there were breaks in the proceedings at which, within the decision in *In re Hall and Barker* (1), the solicitors had a right to send in their bill of costs, such as the making of the award and the sending back the award to the arbitrator.

Secondly, the giving of the bills of exchange by the clients and their acceptance "in settlement" by the solicitors amounted to payment within s. 41 of the Solicitors Act, 1843, and operated to take away the client's right of taxation in the absence of special circumstances; for the giving of a security has been held to be payment of a bill of costs: *Ex parte Turner, In re Boyle* (3); it is not necessary that money should actually pass between the parties.

McCall, Q.C., and *English Harrison*, for the applicants. The bills sent in were in reality one continuous bill; they related almost wholly to one litigation, and did not include a variety of matters, as did the bills sent in in *In re Hall and Barker* (1), in

(1) 9 Ch. D. 538. (2) 30 Ch. D. 1.
(3) 24 L. J. (Ch.) 71.

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which case the relations between the solicitors and the client were very peculiar. The way in which each bill commenced and ended shews that it was intended to be part of one continuous bill, and the fact that on one occasion a corrected account was sent in is important, for, in *In re Cartwright* (1), Lord Selborne held that a letter sent by a solicitor, being a correction of earlier bills of costs relating to the same suit, must be treated as bringing down the whole of the bills as one entire bill to the date of the letter. Assuming that there were in the present case such breaks in the proceedings as would have entitled the solicitors to send in their bill of costs and demand payment, they did not in fact do so at any such break.

Secondly, there was no payment of the bill of costs within the meaning of the statute until the bills of exchange were satisfied. It is clear from *Sayer* v. *Wagstaff* (2) that the delivery by a debtor to his creditor of a bill of exchange or promissory note for the amount of his debt does not amount to payment or discharge of the debt in the absence of special circumstances shewing the intention of the parties that it shall so operate, and that the creditor took upon himself the risk of the bill or note being paid; and the decisions in *In re Harries* (3) and *In re Peach* (4) are to the same effect. The decision of *Ex parte Turner* (5) proceeded upon a very peculiar state of facts, wholly different from those in the present case, and cannot be treated as an authority in favour of the contention that the mere giving of these bills of exchange amounted to payment of the bill of costs.

[They also cited *Stokes* v. *Trumper* (6); *Whitehead* v. *Lord.* (7)]

May 9. CAVE, J. I am of opinion that this appeal must be allowed. It raises two points. The first is, that three out of the four bills were delivered more than twelve months before the application to tax, and were therefore not taxable in the absence of special circumstances, as to the existence of which the case must

(1) Law Rep. 16 Eq. 469.
(2) 5 Beav. 415.
(3) 1 D. & L. 1018.
(4) 2 D. & L. 33.
(5) 24 L. J. (Ch.) 71.
(6) 2 K. & J. 232.
(7) 7 Ex. 691.

go to the master. The applicants, who ask for taxation, contend that the four bills are really only one bill. They are not so in point of fact; but, as we know, the law frequently deals in fictions. Several cases have been cited as being in favour of that contention, among them *Stokes* v. *Trumper* (1); but it was also cited in that way in *In re Nelson, Son, and Hastings* (2), and it is sufficient to notice the remarks upon it made by Cotton, L.J.; we need not consider it further. It seems to me that the cases of *In re Hall and Barker* (3) and *In re Nelson, Son, and Hastings* (2) are in point. It is impossible to read them without seeing that the former case modified the existing practice of the Common Law Courts, and that the principle there laid down was adopted in, and extended by, the latter case. In *In re Nelson, Son, and Hastings* (2) the application was restricted in the Court of Appeal to the taxation of the costs of one action which ran through and formed parts of different bills of costs, and it was held that these could not be said to be one bill. The reason given was the old rule applicable to Chancery actions, that the greater length to which the proceedings were continued enabled the bill of costs to be split up and sent in in separate portions. If that is the principle on which we are to rely, there is that kind of break in the proceedings in the present case. There was a reference and an award; and, assuming that the proceedings were a continuous matter, there was a break when the award was made—a break which ordinarily would have been the conclusion of the whole matter. Then there was an application to set aside the award, and it was sent back to the arbitrator; in fact, it is easy to shew breaks in these proceedings, if it is necessary to do so. But in the case of *In re Nelson, Son, and Hastings* (2), the Court adopted a bolder and more rational principle, and seems to have said that where bills of costs are sent in at fixed intervals the mere fact that each contains some items relating to the same transaction does not make them one bill only. Here the bills have been delivered at intervals of twelve months and six months, and letters have been sent intimating that there must be payment on account or some arrangement, and I am clearly of opinion that

(1) 2 K. & J. 232. (2) 30 Ch. D. 1.
(3) 9 Ch. D. 538.

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they do not amount to one continuous bill; the fact that items of the costs in one case run through all of them is insufficient to make them so. The decision in *In re Nelson, Son, and Hastings* (1) is amply sufficient authority to justify the conclusion at which we have arrived.

This decision, however, only covers three of the bills, for the fourth was only delivered nine months before the application for taxation; as to that bill, it is said that there has been payment. Adopting the decisions in the cases cited to us, it seems to me that the principle to be extracted from them is that if a bill of exchange is given by a debtor to his solicitor on account in order to enable the solicitor to raise money upon it, but without any intention of settling his bill of costs, so that the bill of costs still remains open, the transaction is not equivalent to payment. Lord Langdale says in effect in his judgment in *Sayer* v. *Wagstaff* (2), that if the bill of exchange is given in payment so as to amount to a settlement, and there is an understanding between the parties that the bill of costs is to be taken as settled and discharged, it must be taken as having been settled. It seems to me that in the present case what was wanted was to get rid of the bill of costs—that it is quite clear that the intention of the parties was that the question of that bill should no longer be an open one, that it should no longer be open to the solicitors to deliver an amended bill of costs or to the client to question the items in this bill, and that the bills of exchange were to be taken as a settlement. In my opinion, therefore, there has been here payment of this bill of costs within the meaning of the Solicitors Act, and it is not liable to be taxed.

LAWRANCE, J. I entirely agree.

Appeal allowed.

W. J. B.

Messrs. De Morgan Snell & Co. appealed.

McCall, Q.C., and *English Harrison*, in support of the appeal.
R. M. Bray, contrà.

(1) 30 Ch. D. 1. (2) 5 Beav. 415.

June 7. LORD ESHER, M.R. I am of opinion that this appeal must be allowed. The question is whether a bill of costs, large in amount, though I will not say that it is exorbitant or would be diminished on taxation, comes within the statutory enactment giving a client a right to tax his solicitor's bill upon application made in proper time; if it does, it must be taxed, unless the solicitor can shew that something has happened to take away the client's right to taxation. In the present case, it is suggested on behalf of the solicitors that there were several bills of costs, and that as regards all but one of them the limit of time has been reached beyond which the client cannot ask for a taxation; it is further suggested that if there has only been one bill the client's right to taxation has been taken away by something which has happened—in other words, by payment. The first question for us, therefore, is whether there were several separate bills of costs, so that with regard to each of such bills but the last the time for taxation has elapsed.

Now, with respect to the delivery of a solicitor's bill of costs, in cases where in fact several accounts have been delivered, two points may be, and generally are, raised—one of law and one of fact. If the solicitor insists that one of these accounts was a final bill of costs, the question of law arises whether at the time when he assumes so to deliver it it could be delivered as a final bill. If a solicitor undertakes to carry through a legal transaction, the law is that he cannot send in a final bill of costs until that transaction is completed; the law on the point is the same in equity as at common law. But in equity the nature of many of the suits is such that they can be divided into stages, and the Court may treat the legal transaction as finished although the suit has not been carried to its final conclusion; this is a most important feature of Chancery proceedings. The ordinary procedure in equity is for the matter to go on to the stage of decree. In many suits there may be successive decrees; but the decision or decree has to be worked out—a process which may take years; and it becomes obvious that one part of the legal transaction undertaken by the solicitor may have been determined when the decree is made, and that the working out of the decree may form a new and distinct part of the legal

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transaction. In an ordinary common law action, the duties of the solicitor are completed when judgment is pronounced: the client gets nothing by the action until that time; though the circumstances of each action may differ, the law applicable to them is the same. That is the law in such a case as the present, and it is therefore necessary to consider whether, even although a solicitor may intend a bill to be final, he has power to send it in as a final bill.

Now, as regards the first bill sent in, there was nothing at that time that could be sent in as a final bill which the clients could proceed to tax; although, of course, the solicitors might ask for a payment on account. As to the later bills, I am inclined to think (though it is unnecessary to determine it) that when the award was given there was a break—that is, such a conclusion of a definite and distinct part of the legal transaction as would entitle the solicitors to send in a final bill of costs, such as might in Chancery be sent in at the stage of decree; and I am inclined to think that the appeal and the other matters which occurred afterwards formed also a distinct and separate part of the legal transaction for which another bill of costs might have been sent in. But a solicitor cannot be said to have sent in a final bill if he has sent in something which neither party understood nor intended to be final. Whether in the case of a series of bills each bill has been sent in as a final bill, or whether they are mere statements of account shewing how far the expenses have gone up to the time of sending them in, is a question of fact to be determined on the evidence in each case, and it is a question which cannot be determined in any case upon the finding of the Court in any other case. The Court cannot lay down rules as to what is conclusive evidence binding subsequent Courts in subsequent cases; neither in equity nor in Common Law Courts can one judge bind another on a question of fact, whether the facts may or may not look exactly alike.

It becomes, therefore, a question of fact in the present case whether the solicitors ever sent in a final bill before the last one, and to determine this all the circumstances must be looked at. The first bill was sent in when they had no right to send in

a final bill, and we are bound to draw the inference that the solicitors did not intend it to be what it could not legally be, but that they intended it to be merely a statement of the expenses up to the time at which it was sent in. A great fact in the case for our consideration is the nature of the bills sent in and the way in which they were treated by the parties. With each bill there was sent a statement of account; what was the nature of the statement? It was an explanation of the bill. Looking at the first bill, we find that, although it includes items as to other matters, it begins with the early steps of this litigation down to June 30, 1890; then the second bill, carrying on the items of costs in the same litigation, begins on July 1, 1890, and goes down to June 30, 1891; and so on with the others, each bill taking up the transaction from the date where the preceding bill ends. Statements of account are sent with the second, third, and fourth bills, in each of which a balance is carried down from one bill to the next, and payments on account made by the clients are credited to them. Now, whether it be in the case of a solicitor's bill of costs or a bill sent in in the course of ordinary business, where several accounts are sent in one after the other, in which a balance is carried down from the one to the other, every man of business would treat them as intermediate statements which, by carrying on the balance from one to the other, would eventually make up one whole account. There is the strongest evidence in the present case that the intermediate bills were intended to be merely statements of how things were going on and were not intended as final bills. The solicitors never asked for payment of any of them, but asked for and took payment on account; they never treated the matter otherwise than as one running account. The conclusion, therefore, that I have come to is, that both sides treated this as one running account, and that, therefore, the point taken, that each was a final bill and that the time for asking for taxation had gone by, fails, for the time for an application for taxation never arrived until the delivery of the last account.

That being the conclusion at which I have arrived on the facts, is there any authority to prevent us saying that there was here only one account and one bill of costs? The case of *In re*

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Nelson, Son, and Hastings (1) has been cited to us in support of that contention; but if the question in that case was one of fact the decision in no way binds us. I have the clearest opinion that that decision was one of fact, and that it depended upon this consideration, that the earlier accounts had been settled between the parties as though they were separate statements of account, and that it had been agreed between the parties that they were to be treated as settled and not to be inquired into; the decision is, therefore, no authority in the present case.

Treating it then as one continuous bill of costs, it is contended by the solicitors that it has been so dealt with by the parties that there has been a settlement equivalent to payment, and that the clients cannot therefore ask to have it taxed. If the bill has not been paid, the clients have a right to taxation; if it has, their right has gone; and the question for us therefore is, was the bill paid? It is admitted that the answer to this question must depend on the answer to the further question, Did the solicitors take the acceptances on the terms that they were to consider the bill as having been paid whether the acceptances were dishonoured or not, or did they take them on the ordinary terms on which a creditor takes the acceptances of his debtor? It is perfectly well-known law, which is acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it. Such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity, and it is surprising that there can be at the present day any doubt as to the business result of such a transaction. In the Court below, Cave, J., was of opinion that the necessary implication arising ordinarily from the giving of a negotiable security for a debt did not arise in the present case, because he thought the solicitors took the acceptances on other than the usual terms on which a creditor takes a negotiable security—that is to say, that they took them upon terms agreed upon with their debtors, that the bill of costs was to be considered as paid, although the bills of exchange might be dishonoured. But the

(1) 30 Ch. D. 1.

person who sets up such an agreement is bound to prove it, and the solicitors are bound to prove that both they and their debtors intended this result at the time. They are men of honour and position in their profession, and I do not believe that they intended to take these bills of exchange on those terms for the purpose of shutting out their clients from all power of taxing their bill of costs. I have no doubt they took them on the ordinary business terms as conditional payment of their debt. I disagree, therefore, with the view of the facts taken by Cave, J., and find this fact the other way. The result is, therefore, that the appeal must be allowed.

BOWEN, L.J. I should add nothing to what has been said by the Master of the Rolls, were we not differing from the view taken in the Court below; but out of respect to those learned judges I will give the reasons for my concurrence.

It seems to me extremely desirable that we should keep clearly in our minds what points are points of law and what are points of fact. When this is once done, it will be found that all the cases which have been cited to us fall naturally into their places. We have to consider whether the earlier bills of costs sent in were such bills of costs and so delivered as to make their delivery a delivery of bills of costs under the Solicitors Act. It is clear that they might have been such bills, had they been so treated by the parties. Were they divisions or chapters of one bill of costs delivered from time to time, or were the earlier ones delivered as bills of costs within the meaning of the statute? Whether they were delivered as bills of costs becomes a question of fact. To make up one's mind on this part of the case one has incidentally to consider whether the solicitors had a right to deliver bills of costs, and, if not, whether the documents were taken by agreement of the parties as separate bills of costs, each standing, if I may so express it, by its own strength. In the first place, had the solicitors a right to insist that each document was independent of the others, and was a bill of costs within the statute? And this is a different question from the question whether the client had a right so to treat them. This draws us into a discussion as to whether at the times the bills were delivered

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there was such a natural break in the business as to justify the solicitors, if they wished, in sending in their bill and asking for payment. I need do no more than observe that the law as to common law actions, which is laid down by Lord Lyndhurst and Parke, B., in *Harris* v. *Osbourn* (1), is, that primâ facie a solicitor, when he is retained by the client, undertakes to finish his client's business. As to business which is not a common law action, but which may be a suit in equity, lengthy either by reason of the number of the parties or by reason of its comprehending a variety of really independent litigation, there may be natural breaks, and this is clearly laid down and explained by Jessel, M.R., in *In re Hall and Barker.* (2) It is not necessary in the present case to define the natural breaks which may occur in a Chancery suit. There has here been a protracted arbitration, and we need not and cannot define the breaks which may take place in such a proceeding; there may, however, be some breaks which must be recognised as such. When we have made up our minds that the solicitors had a right to treat any division of the proceedings as a natural break, we have to ask ourselves whether they exercised that right, for obviously they may have had the right and yet may not have intended to send in a bill of costs in exercise of that particular right. If, however, we determine that the solicitors had no such right, we must ask ourselves the further question of fact whether both parties agreed to treat the documents as bills delivered under the Act.

Putting aside, therefore, the character of the breaks, we have to decide the question of fact whether there has been a delivery of a bill of costs under the Act by the delivery of a bill containing various items of costs. Payment on account by the client in respect of the separate bills is not conclusive to shew that each of them was a separate bill of costs under the Act; it may be consistent with a clear understanding between the parties that the ultimate bill sent in should be the bill of costs, and that the payments were to be considered as made against that bill. It must always be a question of fact whether a document is a separate bill of costs or, so to speak, a chapter in a volume. In determining whether a document has been delivered as a bill of

(1) 2 C. & M. 629. (2) 9 Ch. D. 538.

costs, it must not be forgotten that the onus of shewing that it has been lies on the solicitor; he must make out as to each document of the series that there has been such a delivery of a bill of costs as to satisfy the law. In this particular case it is most material to observe that the delivery of the bills does not correspond, except perhaps in one case, with any natural break in the litigation. Accompanying each of the bills was a current account shewing the state of the cash account between the parties from half-year to half-year, and finally (and this is a very eloquent fact) there is an absence of all demand for payment of the bills as bills; the solicitors did no more than on two occasions ask for money on account in respect of the work done by them extending over a very considerable time. It is true that this fact is not conclusive; but taking all the circumstances together and bearing in mind that the onus is on the solicitors, I think that there has been a failure to prove the delivery of separate bills of costs within the meaning of the statute.

Several cases have been cited to us, but when carefully looked at they all fall into their place. They are all based on the view that at the moment of delivery of the bill there was a natural break in the proceedings which justified the delivery, or else there has been a finding in fact that there has been such a delivery. They are all decisions of questions of fact. It is not necessary for us to distinguish the case of *In re Nelson, Son, and Hastings* (1), for that was a decision of fact, as appears more clearly at 54 L. J. Ch. 998; and we can plainly see what was the determining fact in that case, which cannot be looked upon as an authority upon a question of law. In that case London solicitors were in the habit of sending to a country solicitor each year bills of costs, the last of which had been sent in within twelve months of the application for taxation, and it is obvious, on reading the arguments and the judgment of Pearson, J., that there was in that case an attempt to treat a series of bills as a continuous bill for the purposes of taxation, although the payments on account had been made in such a manner as to shew that the parties intended each bill to be a separate bill, and intended to make a settlement on that basis. Pearson, J., puts

(1) 30 Ch. D. 1.

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his judgment on that ground; he says: "This application is simply for the taxation of bills which have been delivered more than a year, and which the country solicitor has settled in account with the London agents. In the absence of any special circumstances, this cannot be allowed." It is true that in the appeal to the Court of Appeal the only question was as to the costs in an administration suit, which ran through all the bills, and that the rest was abandoned; but it is obvious that the pivot on which the decision of the Court of Appeal turned was that there had been a settlement of the account each year between the London solicitors and the country client, and that the Court came to the same conclusion as Pearson, J., although their judgment was limited to one portion of the litigation. In my opinion there is in that case no rule of law which is in conflict with our present decision; it is clear to me that the judgment proceeded upon an inference of fact.

Then, if these were not independent bills, but only portions of one continuous bill, there only remains the question whether it was paid. On that question I take entirely the same view as the Master of the Rolls. It has been established by a series of authorities, which it would be ridiculous to go through seriatim, that a bill of exchange given for a debt amounts to conditional payment of that debt, and is only conditional payment so long as it is running; the payment is liable to be defeated when the bill is dishonoured. If a solicitor desires to shew that there has been more than that kind of conditional payment, and that by agreement with the client the bill of costs has been actually paid, it lies on him to shew it, and we must not lose sight of the fact that this burden is on him. If a client gives his solicitor a bill of exchange in payment of his bill of costs, it would, in the ordinary way of business, not amount to such a payment as would deprive the client of the right of taxation; it would be a conditional payment only. If the solicitor says that the bill of exchange was given in such a manner as to amount to payment, he must make this understood by the client when he gives the bill, and he must prove such circumstances as place it beyond all reasonable doubt that the client understood and assented to the arrangement. In the present case there is nothing of the

kind, and the burden of proof has not been satisfied. I think that Cave, J., did not give sufficient importance to the fact that the onus lay upon the solicitors, and that he should not have found in their favour an agreement to take bills of exchange as a payment which put an end to the right of the clients to tax, unless assent to such agreement was clearly brought home to the clients.

KAY, L.J. I concur, and will state my reasons shortly. Whether these bills are several separate bills, or are portions of one bill, is partly a question of law; that is the result of the authorities. If a solicitor is retained in a civil action (it is immaterial whether it be an action at law or in equity), primâ facie his contract is entire; it is a contract to carry the matter through to a conclusion. The result of this is that he has no right under the statute to send in his bill and insist upon payment until the conclusion of the business to conduct which he was retained. But when we come to apply this rule to a complicated litigation, which may last a considerable time, it is difficult to apply it literally, and to say that the solicitor cannot send in his bill till there has been a final conclusion of the proceedings, and that the contract is an entire contract in such a sense that the solicitor has no remedy for his costs till that period has arrived. In such a case as that the Courts have said that the rule must be applied differently, and that the solicitor may send in his bill at a reasonable break in the proceedings, and demand payment of it; and there are several cases in which effect has been given to that view. In *Harris* v. *Osbourn* (1), Parke, B., said: "The cases which have been cited may be explained, either upon the supposition that this is to be treated as a general contract, or upon the supposition that it is a special contract, to carry on the suit to its termination, subject to be put an end to on reasonable notice. In ancient times it was considered as an entire contract, of which the attorney could not divest himself by any means; but, in consequence of the increased expenses of suits in modern times, the rule has been varied, and the attorney is at liberty to determine the contract on reasonable notice. The contract of

(1) 2 C. & M. 629.

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the client is to pay at the completion of the suit; and unless the contract be defeated by reasonable notice, the attorney has no cause of action." Then, in *Whitehead* v. *Lord* (1), it was held that an attorney or solicitor retained to conduct a suit could not sue for his bill of costs until its termination—a decision which was followed by Wood, V.C., in *Stokes* v. *Trumper*. (2) These cases were all brought before Jessel, M.R., in *In re Hall and Barker* (3)—a case in which the solicitor had been retained in certain protracted bankruptcy proceedings; and in giving judgment that learned judge said (p. 544): "I cannot see any reason for assuming that a solicitor, undertaking a business of this complicated nature, such as the administration, whether of a dead man's estate or an insolvent man's estate, which may give rise to a score of suits, and may occupy a score of years before it is finally wound up, should be held to do a single and entire thing, and not be entitled to be paid any remuneration until that single and entire thing is done. I think it is reasonable that a solicitor should not be held to have entered into such a contract." And again he says, referring to the facts of that case (p. 546): "The transaction amounts to this, in my opinion: 'We have done so much work; there is a convenient break in the business, up to which time we have made up our bill of costs; please to pay us up to that time, and when the outstanding matters are concluded, which we hope will be shortly, we will send in a further bill.'"

How are we to apply those decisions to the present case? Here there was an arbitration, in which a firm of solicitors were retained for one of the parties; it commenced on February 28, 1890, and the final conclusion of the proceedings was reached on July 12, 1892, on which day the last bill of costs was delivered. There were certain breaks in the litigation; an award was made on March 17, 1891, and it is possible that if the solicitors had then sent in their bill there might have been a delivery of a bill of costs within the meaning of the statute, and within the decision in *In re Hall and Barker*. (3) Then on June 27, 1891, the award was referred back to the arbitrator, and was subsequently confirmed by him. Again there was, I think, a break

(1) 7 Ex. 691. (2) 2 K. & J. 232.
(3) 9 Ch. D. 538.

in the proceedings. Then came another application to the Court, and on November 30, 1891, the award was set aside; an appeal from this decision was dismissed on February 2, 1892; the case went back to the arbitrator, and on May 13, 1892, he made his last award. It is obvious that in the course of these proceedings there were breaks, as to which it is reasonable to say that they might be treated as opportunities for sending in a bill of costs; but in fact nothing of the kind was done. Bills of costs were, it is true, sent in from time to time, but not with reference to any kind of break in the proceedings, and these bills of costs were accompanied by statements of account, shewing the cash received from the clients and the balance due from them; in none of them is there a demand for payment. The true result of what was done is this, that the clients paid moneys on account to their solicitors, and that it was not intended on either side that the bills should be the bills of costs required by the Solicitors Act, but that the intention of both parties was that they should be treated as items in statements of account sent in from time to time, shewing what funds the clients might reasonably be asked to supply to the solicitors for the purpose of carrying on the proceedings. It was not the intention of either party to interfere with the clients' right to tax. It is impossible to treat each bill as a separate bill of costs within the statute, whichever of the two doctrines be relied on.

I feel a little more difficulty as to the second point—that supposing there is one entire bill it has been paid, not paid in fact, but paid by the delivery of bills of exchange for the amount of the balance shewn in the last cash account, payable at different deferred dates. The receipt is given in a form which seems to express that it is a receipt by the solicitors of a bill of exchange to be taken by them in satisfaction of their bill of costs. Let us look at the nature of such a transaction from the point of view of both sides. If the clients told the solicitors that the bills of exchange were to be taken in discharge of their ordinary obligation, the solicitors might say that they would only take them as payment if honoured, while in the event of their being dishonoured they would only be regarded as conditional payments. The only difficulty I feel is, that here persons who have given bills

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which have been dishonoured say that they will not treat them as having been given in payment. But if a transaction is to be treated as a payment, it must be treated as payment on both sides; and I agree that in the present case there has not been such a payment as to preclude the clients from applying for taxation. There is another consideration which operates upon my mind: that if it was intended, when these bills were taken, to treat them as absolute payment of the bills of costs, so as to preclude the solicitors from exercising their right to sue, and the clients from exercising their right to tax, without shewing special circumstances, in such a transaction as that between solicitor and client it is the solicitor's duty to shew that he made clear to his client its necessary result. Here, nothing of the kind has been done; and I am clearly of opinion that the solicitors never intended to deprive the clients of their right of taxing their bill.

Appeal allowed, and order of Mathew, J., restored.

Solicitors: *Nunn & Popham; Romer & Haslam.*

W. J. B.

C. A. 1893 *July* 11, 12.

[IN THE COURT OF APPEAL.]

RAYSON *v.* SOUTH LONDON TRAMWAYS COMPANY.

Malicious Prosecution—Criminal Proceeding—Tramway Company—Proceedings against Passenger for refusing to pay Fare—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 51, 52, 56.

By s. 51 of the Tramways Act, 1870, any person travelling in any carriage on any tramway, who avoids or attempts to avoid payment of his fare, or any person who, having paid his fare for a certain distance, knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, shall for such offence be liable to a penalty not exceeding 40s.; and by s. 56, all tolls, penalties, and charges under this Act may be recovered and enforced under 11 & 12 Vict. c. 43, and any Act amending the same:—

Held, that proceedings taken under s. 51 were proceedings in respect of a criminal offence, so that an action for malicious prosecution would lie against the persons taking them.

MOTION to enter judgment for the defendants, or for a new trial, by way of appeal from the verdict and judgment in an action for malicious prosecution, tried before Grantham, J., with a jury.

The defendants, a tramway company, summoned the plaintiff to appear before a metropolitan police magistrate for having committed an offence against s. 51 of the Tramways Act, 1870 (33 & 34 Vict. c. 78) (1), by having, whilst travelling in a carriage on the tramway, avoided, or attempted to avoid, payment of her fare; and, having paid her fare for a certain distance, for having knowingly and wilfully proceeded in such carriage beyond such distance without paying the fare for such additional distance. The magistrate dismissed the summons, and the plaintiff brought her action against the tramway company for a malicious prosecution, and obtained verdict and judgment for 150*l.* damages.

The defendants now moved to have judgment entered for them, or for a new trial, on the ground (inter alia) of misdirection.

Crump, Q.C., and *Hume Williams*, for the appellants. The learned judge at the trial ought not to have left the case to the jury. The proceedings which may be taken under s. 51 of the Tramways Act, 1870, are not proceedings taken in respect of any criminal offence, and no action for a malicious prosecution lies. They are proceedings in respect of a civil matter, and are in the nature of an action to recover penalties, which has never

(1) Sect. 51: "If any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects on arriving at the point to which he has paid his fare to quit such carriage, every person shall, for every such offence, be liable to a penalty not exceeding 40*s.*"

Sect. 52: "It shall be lawful for any officer or servant of the promoters or lessees of any tramway, and all persons called by him to his assistance, to seize and detain any person discovered either in or after committing, or attempting to commit any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or until he be otherwise discharged by due course of law."

Sect. 56: "All tolls, penalties, and charges under this Act, or under any by-law made in pursuance of this Act, may be recovered and enforced . . . . in England before two justices of the peace in manner directed by 11 & 12 Vict. c. 43 . . . . and any Act amending the same."

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been held a criminal proceeding: *Atcheson* v. *Everitt.* (1) The distinction between criminal and civil proceedings has often been pointed out. Where the proceedings are taken on behalf of the public, or in respect of a misdemeanour at common law, then they are criminal. *Mellor* v. *Denham* (2) and *Reg.* v. *Whitchurch* (3) affirm that principle. But where, as in *Attorney General* v. *Bradlaugh* (4) and in this case, an Act of Parliament imposes a new obligation not known to the common law, and imposes a penalty as the only consequence of the non-fulfilment of that obligation, the liability to the penalty does not make the prohibited act a crime. Nor does the fact that under another Act justices have power to settle the dispute make the doing of the prohibited thing a crime. The Tramways Act, 1870, is a very special Act. It is submitted that its effect is simply to impose a penalty, to be recovered before justices, as the only consequence of the non-fulfilment of the obligation. *Reg.* v. *Tyler* (5), and the other cases decided upon s. 47 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), with respect to the right of appeal, do not apply to the present case. Sect. 47 deals with procedure, and, as was pointed out by Lord Esher, M.R., in *Ex parte Woodhall* (6) and *Ex parte Schofield* (7), it was important that the words "criminal cause or matter" in that section should receive the widest possible interpretation, the intention being that no appeal should lie in any "criminal matter" in the widest sense of the term, the Court of Appeal being constituted for the hearing of appeals in civil causes or matters only. But the decisions upon whether a matter is a "criminal matter" within the meaning of s. 47, so as to prevent an appeal being brought, do not govern this case, where the question is whether the proceedings taken under this special Act of Parliament are criminal proceedings so that an action for malicious prosecution may be founded upon them.

[They also referred to *Quartz Hill Gold Mining Company* v. *Eyre.* (8)]

C. A. Russell, for the respondent, was not heard.

(1) 1 Cowp. 382.
(2) 5 Q. B. D. 467.
(3) 7 Q. B. D. 534.
(4) 14 Q. B. D. 667.
(5) [1891] 2 Q. B. 588.
(6) 20 Q. B. D. 832.
(7) [1891] 2 Q. B. 428.
(8) 11 Q. B. D. 674.

LORD ESHER, M.R. In this case the first proposition suggested by the appellants is that, even although what was done to the plaintiff was done without reasonable and probable cause and maliciously, nevertheless her action cannot be maintained. Now, there can be no doubt that if what was done to her was to take criminal proceedings against her, and if the criminal process was carried on without reasonable and probable cause and maliciously, then her action would lie. I am not prepared to say that, if the proceedings taken against her in this case were not criminal proceedings, the action would not lie if those proceedings were taken without reasonable and probable cause and maliciously. But it is not necessary to determine that point here, because it is clear to my mind that the proceeding carried on against the plaintiff was a criminal proceeding—that it was a proceeding taken in respect of a criminal offence. The legislature has thought fit to pass an exceedingly strict law in favour of tramway companies. The Tramways Act, 1870, enacts that if a passenger avoids or attempts to avoid payment of the fare due from him to the company, or, having paid his fare for a certain distance, knowingly and wilfully travels farther, and does not pay the fare for the further distance, or attempts to avoid payment thereof, he may be at once detained by the servants of the company, and by any person whom they may call to their assistance—that is, I suppose, in case he resists—as if the company's servants were the police. The refusal to pay under such circumstances is made an offence by the Act of Parliament. The word "offences" heads the group of sections which have to deal with this matter. All within s. 51 comes within the category of "offences." A passenger, therefore, who acts contrary to the provisions of that section commits an offence, and may be detained in custody and taken before a magistrate, who can inflict a penalty not exceeding 40*s.* in respect of that offence. It is admitted that that state of things brings the matter within Jervis' Act. The passenger has done something which the law forbids, and in respect of that thing which the law forbids he is rendered subject to the procedure under Jervis' Act. The matter is made criminal. The offence amounts to a misdemeanour, and if the peculiar mode of dealing

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with it had not been enacted by the same statute which creates the offence, it would be punishable, upon an indictment, as a misdemeanour, and subject the offender to fine or imprisonment; but the legislature having put into the statute what the punishment shall be for the new offence created—that is the only punishment which can be inflicted. The statutory punishment is part of the punishment of a common law misdemeanour, although the process provided by the statute is not the same as in the case of a common law misdemeanour. It is perfectly clear to my mind that this is a criminal offence, and therefore that an action for malicious prosecution will lie.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Wilkins, Blyth, Dutton, & Hartley.*
Solicitors for respondent: *Ray & Miers.*

W. A.

1893 *July* 24.

REICHARDT AND ANOTHER *v.* SAPTE AND ANOTHER.

Copyright—Dramatic—Infringement—Author—Original Play—Sole Liberty of Representation—3 & 4 Wm. 4, c. 15, s. 1.

By 3 & 4 Wm. 4, c. 15, s. 1, the author, or his assignee, of any play, composed and not printed or published by the author thereof or his assignee, shall have as his own property the sole liberty of representing such play at any place of dramatic entertainment whatsoever in any part of the United Kingdom, and shall be deemed and taken to be the proprietor thereof.

In an action for the infringement of the plaintiffs' sole liberty of representing a play of which they were the joint authors, it was proved that the plaintiffs commenced to write the play in the autumn of 1889, and, having finished it in March, 1892, it was publicly performed at a theatre on June 30, 1892; that the defendants wrote a play in many respects similar to the plaintiffs' play, and that the defendants' play was written and completely finished between the end of 1889 and the early part of 1890, and was publicly performed at a theatre on July 4, 1892. The defendants' play was, as between the parties to the action, in every respect an original play, and in no way copied from or suggested by the plaintiffs, and there was no direct evidence that both plays came from a common source:—

Held, that, assuming the two plays to be substantially alike either wholly or in material parts, the plaintiffs were not entitled to maintain their action, because the defendants, having written and finished their play before the plain-

tiffs had written and finished theirs, were entitled to the sole liberty of representation thereof under 3 & 4 Wm. 4, c. 15, s. 1, and, their right having vested, there was nothing in any subsequent legislation to deprive them of it.

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REICHARDT v. SAPTE.

ACTION for infringement of the sole liberty of representing a dramatic piece, tried before Hawkins, J., without a jury, in May, 1893, at the Middlesex sittings.

The facts are fully stated in the judgment of the learned judge.

Bowen Rowlands, Q.C. (*G. S. Bower*, and *E. Bowen Rowlands*, with him), for the plaintiffs.

Lockwood, Q.C., and *Blake Odgers, Q.C.* (*E. Bray*, with them), for the defendants.

Cur. adv. vult.

1893. July 24. HAWKINS, J. The action was brought by Mr. Reichardt and Mr. Goldsworthy against Mr. Sapte and Mr. Alport. In it the plaintiffs, under statute 3 & 4 Wm. 4, c. 15, claimed the sole liberty of representing, at any place of dramatic entertainment in the United Kingdom, a play of which they were the joint authors, called the "Picture Dealer"; and they charged the defendants with having infringed that liberty by representing at divers places of dramatic entertainment a play, called "A Lucky Dog," which was, as they alleged, in substance the same as "The Picture Dealer." They claimed damages for this infringement, and an injunction to restrain its future representation.

The short history of the authorship of "The Picture Dealer" is, according to Mr. Reichardt's evidence, as follows: In the autumn of 1889 he and his co-plaintiff, Goldsworthy, commenced to write the play. It was finished in the month of March, 1892, and on May 3 in the same year it was type-written. On May 4 it was sent to Mr. Thorne, the lessee of the Vaudeville Theatre, to read, with a view to its being produced on the stage. Mr. Alport was Mr. Thorne's manager. Several applications were made for its return, but Mr. Reichardt says he did not get it back till July 7. Anyhow, it was performed publicly at the Ladbroke Hall, Notting Hill, on June 30, 1892. "A Lucky Dog," said to be a piracy of "The Picture Dealer," was first

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represented on the stage of the Strand Theatre at a matinée on July 4, 1892. The history of "A Lucky Dog" is as follows: It was written and completely composed between the end of 1889 and the early part of 1890 by Mr. Sapte, on the suggestion of his wife, Mrs. Sapte. It was then entitled "Peter." It was read by Mr. Blackmoore, a dramatic agent, early in the latter year, in manuscript. On November 5, 1890, three copies were made—type-written. It was offered to, and read by, the stage manager of the Criterion Theatre at Christmas in the same year. In February, 1891, it was offered to, and read by, the brother of the manager of the Comedy Theatre. In July, 1891, it was read by Miss Kingsley in Australia. The name of "A Lucky Dog" was afterwards substituted for "Peter," but the play was in all other respects the same. It was acted and first published at a matinée at the Strand Theatre on July 4, 1892. As a fact I find that the defendants' play, "A Lucky Dog," was finished completely and type-written early in November, 1890, whereas the plaintiffs' play, "The Picture Dealer," was not finished before March, 1892. The plaintiffs' play, however, was first publicly acted on June 30, 1892, whilst the defendants' was not so acted until a few days afterwards. I am satisfied that the defendants' play was in no respect taken or copied from, or suggested by, the plaintiffs', but, as between the parties to the action, was in every respect an original play. Upon this state of things I have to consider whether, even assuming the two plays to be substantially alike either wholly or in material parts, the plaintiffs can maintain this action. By statute 3 & 4 Wm. 4, c. 15, s. 1, it is enacted that "from and after the passing of this Act"—June 10, 1833—"the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom . . . any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and

taken to be the proprietor thereof." The rest of the section refers to the rights of authors, &c., of productions which shall be printed and published; I need not, therefore, refer to it at length. The 2nd section of the same statute enacts that, "if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s*. . . . to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act." Finding, as I have done and do, that "A Lucky Dog" was an original play composed, though not printed or published, by the defendants, and of which they were joint authors, and that it was completely finished some fifteen months or so before "The Picture Dealer" was completed, and that no part of "The Picture Dealer" was used or taken directly or indirectly in the formation and composition of "A Lucky Dog" —however similar the two plays may be in many respects—I can see nothing to deprive the defendants of their right to claim the sole liberty of representation of their play under the first section of the statute; and if that right was vested in them, it seems to me logically to follow that, in allowing their play to be represented as they did at the Strand and other theatres, they were acting within their right; and, if so, no action can be maintained against them for so doing. I care not to discuss, for it is not necessary to do so, the question whether they could have sued the plaintiffs for infringing upon their right by causing "The Picture Dealer" to be represented at the Ladbroke Hall. They clearly could not do so now, for the limited period of twelve months within which such action must be brought (s. 3) has expired. Possibly, assuming the plaintiffs' play to have been as original as the defendants', they might, consistently with the defendants' right, have acquired a similar right for "The Picture Dealer." To me it does not seem that it would

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be in the least degree inconsistent to say that the defendants have the sole liberty of representation for "A Lucky Dog," and the plaintiffs a similar liberty for "The Picture Dealer," assuming both to be original and unaided productions. The statute 5 & 6 Vict., c. 45, does not appear to me to affect the question now under my consideration, or to deprive the defendants of any right conferred upon them by the earlier statute. By s. 3 the endurance of the term of copyright in books was extended to a period of forty-two years—as a minimum period—from the first publication, subject to certain contingencies. Sect. 11 provides that a book of registry, wherein may be registered (inter alia) the proprietorship in dramatic and musical pieces, whether in manuscript or otherwise, shall be kept at the hall of the Stationers' Company, entries in which shall be primâ facie proof of the right of representation or performance, subject to be rebutted by other evidence. Sect. 20 extends to the liberty of representing dramatic pieces the same endurance as is extended to the copyright in books, and the provisions respecting the registration of such copyright are extended and made applicable to such liberty of representation, subject to this—that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent to the first publication of any book. Sect. 24 enacts that no proprietor of copyright in a book shall sue before making an entry in the book of registry; but it expressly provides that nothing therein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece has, under 3 & 4 Wm. 4, c. 15, although no entry shall be made in such book. In none of the enactments in 5 & 6 Vict. c. 45, will be found anything which prejudicially affects the right of sole representation conferred by the statute 3 & 4 Wm. 4, c. 15. The first production of a dramatic piece, mentioned in s. 20 of the statute of Victoria, confers no priority upon the first producer, nor does it confer a title to the sole liberty of representation. That is conferred by the statute 3 & 4 Wm. 4, c. 15, upon the author or his assignee; it only fixes the first production as the point from which (if entitled to it) the endurance of the sole liberty of representation is to be

calculated. In the view I take of this case it becomes unnecessary to consider the question whether, if the plaintiffs' play had been first written, the defendants' play was an infringement of the plaintiffs' right of representation. There are, no doubt, many similarities in the two plays which, in the absence of evidence to the contrary, would have led me strongly to suspect that they had both been written from one common source, or that "The Picture Dealer" had been taken from "A Lucky Dog"; for the many coincidences to be found in them are certainly remarkable. There is, however, no evidence of a common source, nor is there any that the plaintiffs ever saw the defendants' play before its production; whilst the evidence which was given has satisfied me that the defendants' play was finished for more than a year before the plaintiffs', and that the right of the defendants to the sole representation of "A Lucky Dog" had been acquired before the plaintiffs' play was finished. Under these circumstances, I think the defendants are entitled to my judgment.

Judgment for the defendants.

Solicitors for plaintiffs: *Emanuel & Simmonds.*

Solicitors for defendants: *Wordsworth, Blake & Co.; Crosse & Sons.*

W. A.

1893
June 8.

IN RE THE TITHE ACT, 1891.
HUGHES *v.* RIMMER.

Tithes—Liability of Occupier under Contract made before passing of Act—Omission of Landowner to serve Occupier's Liability Notice—Application to County Court for Certificate—Tithe Act, 1891 (54 & 55 *Vict. c.* 8), *s.* 2, *sub-s.* 6.

By s. 1 of the Tithe Act, 1891, an occupier who, under a contract made before the passing of the Act, was liable to pay the tithe rent-charge is made liable to repay to the owner of the lands the amount of tithe rent-charge properly paid by him to the tithe-owner, and by s. 2, sub-s. 6, the landowner must serve on the tithe-owner an occupier's liability notice before he can recover such amount from the occupier, unless he obtains from the county court judge a certificate that there was good and sufficient cause for his failure to give such notice, and that the occupier has not been prejudiced thereby :—

Held, that on an application by the landowner for such certificate it was not necessary to shew the liability of the occupier to pay the tithe rent-charge under a contract made before the passing of the Act.

APPEAL against an order of the county court judge of Lancashire granting to the respondent, an owner of lands, a certificate that there was good and sufficient cause for his omission to give to the appellant, the occupier of the lands, an occupier's liability notice under s. 2, sub-s. 6, of the Tithe Act, 1891 (54 & 55 Vict. c. 8).

By s. 1 of the Act tithe rent-charge is made payable by the owner of the lands out of which it issues; but in cases where the occupier is liable to pay it under a contract made before the passing of the Act, though he ceases to be bound by that part of his contract, he is to be liable to pay the owner such sum as the latter has properly paid on account of the tithe rent-charge which the occupier is liable under his contract to pay. Sect. 2 deals with the recovery of tithe rent-charge through the county court, and by sub-s. 6 enacts as follows: "Where the occupier of the lands out of which the tithe rent-charge issues is liable under any contract made before the passing of this Act to pay the tithe rent-charge, and is consequently liable by virtue of this Act to pay the amount thereof to the owner of the lands, the owner of the lands shall serve notice of such liability

on the owner of the tithe rent-charge, and thereupon, before an order under this section is made, there shall be such service on the occupier in addition to the owner as may be prescribed, and a hearing of such occupier if he appears and desires to be heard. Any owner of the lands who fails to serve such notice as aforesaid on the owner of the tithe rent-charge shall not be entitled to recover from the occupier any sum which he has paid on account of tithe rent-charge as aforesaid, unless and until he has, after notice to the occupier of his application for the same, obtained from the county court a certificate that there was good and sufficient cause for the failure to give such notice, and that the occupier has not been prejudiced thereby."

By the rules made under the Act, the procedure on an application to the county court for the recovery of tithe rent-charge is dealt with at length, and by rules 3 and 6, where an occupier's liability notice under s. 2, sub-s. 6, has been served on the applicant, he is to file a copy of the notice with the registrar.

The respondent, Hughes, was the owner of certain lands of which the appellant, Rimmer, was the occupier under a lease made before the passing of the Act, by which he was alleged to have contracted to pay the tithe rent-charge. The respondent had paid the amount of the tithe to the owner of the tithe rent-charge without serving on the latter the occupier's liability notice required to be given by s. 2, sub-s. 6, in order to enable the landowner to recover the amount from the occupier. The respondent applied to the county court judge for a certificate under s. 2, sub-s. 6, that there had been a good and sufficient cause for his failure to give the notice, and the application was opposed by the appellant on the ground that the landowner was bound to shew the liability of the occupier to pay the tithe rent-charge under his contract as a condition precedent to his right to a certificate. The county court judge declined to decide the question of the occupier's liability upon that application, and granted the certificate. The occupier appealed.

Macmorran, for the appellant. The power to grant a certificate given by s. 2, sub-s. 6, depends on the opening words of that sub-section: "Where the occupier of the lands out of which

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the tithe rent-charge issues is liable under any contract made before the passing of this Act to pay the tithe rent-charge." The liability of the occupier to pay rent-charge under his contract is the basis of the whole sub-section, and if there is no such liability, there is no power in the landlord to give the occupier's liability notice, nor in the county court judge to grant a certificate dispensing with it. There must, at any rate, be evidence of the liability of the occupier under a contract made before the Act; but there was no such evidence in the present case.

Secondly, the time for granting a certificate does not arise until there has been an application in the county court by the owner of the tithe rent-charge against the owner of the land for an order for recovery of the charge. The whole section deals with the recovery of tithe rent-charge from the landowner.

Carver, for the respondent. It cannot be successfully contended that the question of the tenant's liability to pay the tithe rent-charge under his contract with his landlord is to be tried upon an application for a certificate under sub-s. 6; such a question might often involve the decision of serious questions of law. It is not intended that the landlord shall only get the certificate in cases where he can shew the tenant to be liable to pay the tithe rent-charge; he may get the certificate at his own risk, at the risk, in case he distrains, of his tenant replevying or taking other legal proceedings for a wrongful distress.

[He was not called on to argue the second point. (1)]

WRIGHT, J. I think that the meaning of the section is this. It only applies to the case where by a lease or contract entered into before the passing of the Act the tenant has contracted to pay the tithe. The Act obliges the landlord to pay the tithe to the tithe-owner, and says that in the case of contracts made previously to the Act the landlord may recover the amount from the tenant, who under the old law was liable to pay it; he may

(1) A preliminary objection was taken on behalf of the respondent that s. 7 of the Act gave no right of appeal from the grant of the certificate by the county court judge; but the Court, without deciding the question, heard the appeal upon the merits, and it ultimately became unnecessary (the appeal being dismissed) to give judgment upon the point.

recover it by distress without the intervention of the Court. This danger was foreseen, that the landlord might submit to an extortionate demand to the injury of the tenant, or he might enforce his remedy by distress against a person whom he alleged to be liable, and the tenant would have no power to resist his proceedings except by an action for illegal distress. Sub-s. 6 of s. 2 of the recent Act is undoubtedly very obscurely expressed, but its effect seems to be this: that where there is a landlord with this kind of tenant, he may once for all at any time during the tenancy serve a notice on the tithe-owner; that notice gets into the hands of the registrar of the county court, and thereafter, whenever there is a proceeding by the tithe-owner against the landowner, the registrar can refer to this notice. When once such notice has been given to the tithe-owner, it need never be given again, for the Court will always be able to refer to it. But until such notice has been given, the landlord cannot distrain for any tithe unless he has obtained a certificate under the sub-section. The certificate dispenses with the necessity for a notice only as regards the past, for it is absurd to suppose that a certificate would be granted after the landlord's attention has been called to the fact that the notice has not been given. What ought the county court judge to inquire into? Is he to confine his attention to the particular sentence of the sub-section, and say whether there has been good and sufficient cause for the failure to give the notice, and whether the occupier has been prejudiced? Primâ facie, that is all he need do. But it is said that we must import into this last sentence the earliest words of sub-s. 6: "Where the occupier of the lands out of which the tithe rent-charge issues is liable under any contract made before the passing of this Act to pay the tithe rent-charge." I feel very great doubt about it; but on the whole I have come to the conclusion that the sensible construction is that the certificate is a thing by itself, and that the county court judge is not to enter into the question of the construction of the lease and decide whether the tenant is liable in law to pay tithes under it; that may be a very difficult question, worthy of the consideration of the highest Court. It is difficult to say what the legislature meant; but it is absurd to

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IN RE TITHE ACT, 1891. HUGHES v. RIMMER.

suppose that on an application for a certificate the county court judge must determine the tenant's liability to pay tithe.

The other point, that the sub-section does not apply until the tithe-owner has brought the landowner into Court, can hardly be seriously argued.

LAWRANCE, J. I concur.

Appeal dismissed. (1)

Solicitors for appellant: *Hamlin, Grammer, & Hamlin, for Brighouse, Brighouse, & Jones, Ormskirk.*

Solicitors for respondent: *Wynne & Co., for Forshaw & Co., Liverpool.*

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Aug. 2.

[IN THE COURT OF APPEAL.]

LEE *v.* BUTLER.

Sale of Goods—Factors Acts—Possession of Goods under Agreement to Purchase—Furniture—Hire and Purchase Agreement—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 2, 9—*Dispositions by Sellers and Buyers of Goods.*

By the Factors Act, 1889, s. 2, any sale, pledge, or other disposition of goods made by a mercantile agent in possession of the goods with the consent of the owner shall, if certain specified conditions are fulfilled, be as valid as if the agent were expressly authorized by the owner to make the same; and, by s. 9, where a person, having agreed to buy goods, obtains with the consent of the seller possession of the goods, the delivery by that person of the goods under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller, shall have the same effect as if the person making the delivery were a mercantile agent in possession of the goods with the consent of the owner.

L., being in possession of furniture under a hire and purchase agreement made with the plaintiff, sold and delivered the furniture, before the last payment had accrued due or been paid, to the defendant, who received it in good faith and without notice that the plaintiff had any right in respect of it:—

Held, that the sale and delivery to the defendant was within the provisions of s. 9, and therefore valid.

APPEAL from the judgment of Wright, J., at the trial, without a jury, in Middlesex.

The plaintiff's claim in the action was for the return of certain

(1) Leave to appeal was granted, but no appeal was brought from the decision.

goods alleged to be detained by the defendant, or the value of such goods, and damages for their detention.

The following facts were proved in evidence or admitted at the trial: On May 5, 1892, a hire and purchase agreement in writing was entered into between W. E. Hardy, furniture dealer, and Helen Caroline Lloyd, of Thistle Grove Lane, South Kensington, the terms of which (so far as is material) were as follows:—

"First: The said W. E. Hardy agrees to let on hire unto the said H. C. Lloyd, hereinafter called the hirer, who agrees to take on hire upon the terms hereinafter expressed, the furniture, goods, and chattels mentioned and specified in the schedule hereunder written.

"Second: The said hirer for herself agrees, subject as hereinafter provided, to pay to the said W. E. Hardy, as and by way of rent for the hire and use of the said furniture, goods, and chattels, the respective sums and at the periods following: that is to say, the sum of 1*l.* on May 6, and the further sum of 96*l.* 4*s.* on August 1, 1892.

"Third: The said hirer further agrees that she will not, during the continuance of this agreement, remove the said furniture, goods, and chattels from 5, Thistle Grove Lane aforesaid to any other premises without the consent in writing of the said W. E. Hardy . . ."

The fifth clause provided that if at any time thereafter during the continuance of the agreement any payment of rent thereby reserved should be in arrear and unpaid for the space of one week after the specified days or times whereon the same should become due, or if the hirer should remove the said furniture, goods, and chattels from 5, Thistle Grove Lane, or from any place to which they should have been removed with the consent of W. E. Hardy, then it should be lawful for W. E. Hardy or his agent forthwith to take possession of and recover the said furniture, goods, and chattels without notice to the hirer of his intention so to do, and for that purpose if necessary to enter by force into any premises where the said furniture, goods, and chattels might then be, and search for and remove the same. And in such case the hirer agreed that all moneys paid by her before such default should be applied by W. E. Hardy as

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payment on account of hire and not as part payment of the said furniture, goods, and chattels.

The fifth clause concluded :—

"The said W. E. Hardy for himself hereby agrees that when and as soon as the said hirer shall have well and truly made all payments of rents hereinbefore reserved and performed all the stipulations and agreements hereinbefore on her part contained, the rent or payments hereinbefore mentioned and reserved for the said furniture, goods, and chattels, shall thereupon cease, and the aforesaid furniture, goods, and chattels shall thenceforth be and become the sole and absolute property of the said hirer. But it is expressly declared and agreed that no property or interest in the said furniture, goods, and chattels other than as tenant as aforesaid shall vest in the said hirer until the whole of the said payments of rent hereby reserved, amounting together to the sum of 97*l.* 4*s.*, shall have been actually made by her as hereinbefore provided."

A schedule of the articles of furniture followed.

W. E. Hardy duly assigned the agreement and all his interest thereunder to the plaintiff, and subsequently Mrs. Lloyd, before all the instalments were paid under the agreement, sold and delivered the goods to the defendant, in whose possession they were when the action was brought.

Wright, J., gave judgment for the defendant, holding that the case came within s. 9 of the Factors Act, 1889 (52 & 53 Vict. c. 45) (1), which section afforded a good defence to the action.

The plaintiff appealed.

(1) Sect. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Sect. 9: "Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of

Lynch, for the appellant. Mrs. Lloyd was not "a person having bought or agreed to buy goods" within the meaning of s. 9 of the Factors Act, 1889. A hire and purchase agreement such as this is not within the section; the agreement to sell is conditional; the purchase does not take place unless and until the last instalment is paid. Assuming there is an agreement to purchase, still, it is contended, the Factors Acts were not intended to include this sort of case. Under the earlier Factors Acts (6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39) furniture was held not to be within the words "goods, wares, and merchandize": *Wood* v. *Rowcliffe*. (1) A similar limitation ought to be placed upon those words in the Act of 1889.

[KAY, L.J. By s. 1, sub-s. 3, "the expression 'goods' shall include wares and merchandize." The word "goods," therefore, would seem to cover something more than wares and merchandize.]

The statute is intituled, "An Act to amend and consolidate the Factors Acts." It is submitted that the intention was to deal with such mercantile transactions as were dealt with by the previous Factors Act. There has been no decision as yet upon the Act of 1889.

C. L. Attenborough, for the respondent, was not heard.

LORD ESHER, M.R. This is a very plain case, and the construction of the statute is very clear. It deals with "Dispositions by mercantile agents" in one set of sections, and with "Dispositions by sellers and buyers of goods" in another set of sections, in which s. 9 is included. The case is clearly within that section. [His Lordship read s. 9.] Mrs. Lloyd had agreed by this hire and purchase agreement to buy the goods, and they were put into her possession with the consent of the owner. Mrs. Lloyd sold the goods to the defendant without notice that they were not hers, and he, acting in good faith and with no notice of the

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the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

(1) 6 Hare, 183, at p. 190.

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plaintiff's right, received them. Sect. 9 was passed to meet this very kind of case. I am of opinion that the judgment of Wright, J., was right, and this appeal should be dismissed.

BOWEN, L.J. I agree.

KAY, L.J. I am of the same opinion. The agreement in question is plainly an agreement for purchase. It begins by stating that it is an agreement for the hire and purchase of furniture. Then the hirer agrees to pay, by way of rent for the hire and use of the furniture, the sum of 1*l.* on May 6, and the further sum of 96*l.* 4*s.* on August 1, 1892; and the last clause provides in effect that the goods shall become the sole and absolute property of the hirer when the two sums, amounting to 97*l.* 4*s.*, have been paid. No doubt, therefore, it is an agreement for purchase. The case is clearly within s. 9, which seems to have been intended to cover this very kind of transaction.

Appeal dismissed.

Solicitor for appellant: *Alfred Ashley.*
Solicitor for respondent: *John Attenborough.*

W. A.

SMITH & SERVICE *v.* THE ROSARIO NITRATE COMPANY, LIMITED. 1893

May 5; June 16.

Ship—Charterparty—Restraints of Princes and Rulers—Demurrage—Customary mode of loading.

The defendants chartered the plaintiffs' vessel to load a cargo of 3000 tons of nitrate at Iquique in Chili at the rate of 200 tons per working lay day, to be reckoned from the day the vessel was ready to receive cargo to the day of her dispatch, "restraints of princes and rulers, political disturbances or impediments . . . . during the said voyage always mutually excepted."

There was at Iquique only storage room for a small quantity of nitrate, and the customary mode of loading there was to send the nitrate by rail from the mines direct to the ship's side as required for loading.

The vessel arrived at Iquique on January 29; but at that time a civil war had broken out in Chili, and by reason of the existence of a state of war in the town itself it was impossible up to March 5 to load any nitrate from the port. After that date it was possible to load from the port; but in consequence of the railway from the mines to Iquique being in the hands of the troops, no nitrate from the mines could reach Iquique until March 23, on which day the loading commenced, and finished on April 4. The vessel sailed on April 8. She was then short of coal, and it being very dear at Iquique she put in to another Chilian port for it. She was there detained for ten days in consequence of her refusal to pay over again to the Chilian government in power at that port the export duties which she had already paid to the government in power at Iquique. An action having been brought by the plaintiffs for demurrage:—

Held, that the delay in both cases fell within the exception in the charterparty.

FURTHER consideration before Pollock, B.

The facts and arguments sufficiently appear from the judgment.

Joseph Walton, Q.C., and *Hollams*, for the plaintiffs.

R. T. Reid, Q.C., and *J. W. Mansfield*, for the defendants.

Cur. adv. vult.

June 16. POLLOCK, B. This was an action tried before me at the Guildhall during the recent sittings. The plaintiffs' claim was for demurrage under the charter of a steamer called the *Mount Tabor* which was chartered by the defendants to proceed to Iquique, and there to load a cargo of 3000 tons of nitrate of soda in bags, and then to proceed to ports in the United Kingdom or on the continent. The charter provided for the loading

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of the cargo at the rate of 200 tons per working lay day, and after provisions as to the lay days of the vessel there came the usual clause mutually excepting restraint by princes and rulers, political disturbances, or impediments, earthquakes, fire, pirates, and enemies, the dangers of the seas, and navigation, &c., during the said voyage. The only case that was made for the defendants was that by the restraint of princes and rulers, and political disturbances, the charterers were unable to load within the ordinary working lay days, and therefore that they came within the exception.

When the *Mount Tabor* arrived at Iquique, which was on January 29, 1891, there had already commenced what I might call a civil war, which began on January 7; and it was quite clear that at that time, no loading of any ships in the harbour or port of Iquique could possibly take place. That state of things went on till about February 26. I think it is perfectly clear, in fact it is practically admitted, that the state of civil war going on within the town of Iquique itself, and within the port was such that it would have been quite impossible for any vessel to load during that period.

During the course of that time, on two occasions, the first being on or about February 6, and the other being on or about February 25, the *Mount Tabor* took a short trip to Arica; on each occasion taking away people from Iquique, apparently from motives almost of humanity, but at all events under pressure of circumstances, taking away people who, if they had not been taken away, would probably have been in great danger, and many of whom might have lost their lives. That part of the case was not contested to any extent, and I find as a fact that those two trips took place with the consent of both parties, and that the ship earned something by those trips, and that what was done was done under the pressure of circumstances, and for the best for all parties concerned, in order that the ship might earn something rather than lie idle.

Now comes the real contest between the parties. I have already said that up, certainly, to the 26th or 27th of February, it was impossible to load any cargo. After that, when the vessel had returned from her second trip on March 5, it appears that

she did load a small quantity of nitrate of soda which was ready stored at Iquique. It so happens that at the port of Iquique itself something less than 100 tons of nitrate is all that can be stored; and therefore the customary mode of loading is by sending the nitrate down direct by rail from the mines to the port and the quay, and putting it on board the vessel as it is acquired at the mine. That was very fairly admitted by Mr. Walton, who further admitted that in keeping at the port only the store of nitrate that was kept there the defendants were acting reasonably, from a business point of view, and also that they (the defendants) could not sooner get more nitrate from their mines.

What happened then was this. Although the fighting was not actually going on in the town of Iquique itself, yet there was fighting going on higher up in the country. The railway by which the nitrate was sent down from the mines to the place of loading was occupied from time to time by troops, the country by the side of the railway was occupied by troops, and I find as a fact—indeed, there is no dispute on that part of the case—that it would have been impossible to bring down nitrate from the mines so as to enable the charterers to load the ship at that time. That state of things went on until March 23, when it ceased. The ship began to load on that day, and by April 4 the loading was finished, and on April 8 the ship sailed. Subject to another small matter, which I shall mention presently, these are the material facts.

The question is what is the proper application of the clause, "restraints of princes and rulers, political disturbances or impediments" and so forth, to the facts of the particular case? The charterers and the shipowners must of course be taken to be bound by the terms of this charter, the only question being what is the meaning of it as between them. I think it is perfectly clear as between them, that this must have applied to the loading of the ship. Then comes the question, what, as between them, is meant by the loading of the ship? The loading of the ship, upon all principles of authority, must be taken to mean the loading of the ship in the ordinary, proper, and usual manner at the port to which the ship is chartered; and if the ship could not be loaded in that manner by reason of the restraints of princes and rulers, political disturbances and so

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forth, then the charterers are protected. Therefore that reduces the question to really a very narrow compass, namely, whether this particular form of loading the ship must be supposed to have been contemplated by both parties to the charterparty.

In my judgment the case comes within the principle laid down in the well-known case of *Hudson* v. *Ede*. (1) Kelly, C.B., there goes into the whole question as applicable to this subject. The particular exception there was in a grain charter where the loading was to be at Sulina at the mouth of the Danube, and the particular exception was "detention by ice and quarantine not to be reckoned as laying days." The vessel went to the port of Sulina to take her cargo of grain, and the lay days having elapsed, they were unable to take on board the cargo, not because of the ice at the port of Sulina, but because "The River Danube from Sulina upwards as far as Galatz, a distance of 110 miles, from which port the grain was to be brought to be put on board the vessel, was frozen over or so encumbered with ice as to be impassable for the lighters by which the grain was to be conveyed." Under those circumstances the Court held that this was a detention by ice within the meaning of the charterparty. The Court say: "The conveyance by the river between Galatz and the ship at Sulina may be considered as a part of the act of loading, and as there were no storehouses for grain at Sulina, the case seems to be the same as if the ice lay between the shore from which, of necessity, the grain must be brought, and the vessel in which it was to be loaded, and so that the parties must have contemplated that portion of the river as a part of the waters through which the cargo was to be conveyed between the shore and the ship, and in which detention by ice was to be provided against and excepted in the charterparty." I think the principle of that case applies here, and that it is as if the whole area of the railway from the mines down to the port of loading was a part of the ordinary transit necessary to the loading of the vessel. I need hardly say that that can only arise where the usual and universal manner of loading is that which has taken place in this case.

That view has been supported by several decisions since, and I think I ought to refer to the *Alne Holme*. (2) In that

(1) Law Rep. 3 Q. B. 412. (2) [1893] P. 173.

case a steamer was chartered to take a cargo of timber from Tornea to Sharpness, and the customary mode of discharging at Sharpness was into lighters by which the timber was taken up the ship canal to Gloucester, but when the ship arrived no lighters were available owing to a strike among the labourers who discharged the lighters at Gloucester. The charterparty expressly excepted any time lost by reason of strikes, and the Court held that the parties contemplated the customary mode of discharge, which was by lighters, and was therefore delayed by the strike, within the meaning of the exception, and that the case fell within the decision in *Hudson* v. *Ede*. (1) There is a very similar decision by my brother Charles in the case of the *Sailing Ship Allerton Company* v. *Falk*. (2) There are two other well-known cases: *Kay* v. *Field* (3), and *Grant* v. *Coverdale*. (4) In the latter case, I myself held that a clause of this kind applied where a cargo was shipped from Cardiff Docks, and the Court of Appeal and the House of Lords held that I was wrong in so deciding; but as far as the present case goes, the distinction taken in the Court of Appeal, and particularly in the House of Lords, points very clearly to the true difference between that case and this. Lord Selborne there points out that although there was nothing unnatural or in one sense unusual in the cargo being at a distance from the actual place of loading, and being prevented from getting to the place of loading by ice, which was one of the excepted circumstances, the rule laid down in *Hudson* v. *Ede* (1) would not apply there, because it could not be said that the cargo necessarily was where it was (in one of the minor quays at the Cardiff Docks), because it was not the universal custom or usage of the port to load from that particular spot, or to have a cargo for loading stowed there. There was nothing unreasonable so far as the charterers were concerned in having it there, but it was not there in accordance with the usage and custom of the port, and therefore it could not be supposed that the shipowners when entering into the charter had contemplated its being there and being loaded from that place.

(1) Law Rep. 3 Q. B. 412.
(2) 6 Asp. Mar. Cas. 287.
(3) 8 Q. B. D. 594; 10 Q. B. D. 241.
(4) 8 Q. B. D. 600; 11 Q. B. D. 543; 9 App. Cas. 470.

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One other matter I ought to mention. I have already stated that the loading began on March 23, and was finished on April 4, and the vessel sailed on April 8; but she did not sail right away to the United Kingdom, because the master thought that, coal being very dear at Iquique, he could do better by acquiring coal at another place in Chili called Coronel, and accordingly he went to Coronel for coal to fill up the bunkers. If there had been no difficulty or delay at Coronel, there would be no objection to his having gone there; but when he got to Coronel the Government there detained the vessel and demanded the payment of the export duty on the cargo. The answer to that was, "We have paid it—we paid it to the de facto Government at Iquique, and we could not help paying it to them, because they were the de facto Government, and they had the power to collect it." The other side who were in possession at Coronel, said, "No, you must pay over again to us; we do not recognise that Government;" but ultimately they gave way on that point. There was delay at Coronel from April 14 to April 24, and that was produced, in my judgment, by the same causes, and came within the same exception as the delay which had been caused at Iquique.

Ultimately the vessel sailed, and arrived on July 6. When she arrived, it was found that her bottom was very much damaged by the barnacles that had stuck to her, and it is said that that had impeded her voyage. In respect of that a claim has been made, but I do not think that it was seriously insisted upon. If it had been, I think the answer, and the very obvious answer, would have been conclusive. I cannot think that because a vessel is detained, within an exception covered by the charter-party, and during that period she acquires barnacles upon her bottom, which impede her progress, therefore the shipowner has any claim whatever against the charterers in respect of the extra delay so caused. That disposes of the whole of this case, and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Hollams, Sons, Coward, & Hawksley.*
Solicitors for defendants: *Norton, Rose, Norton & Co.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1893
July 27.

THE DISCOUNT BANKING COMPANY OF ENGLAND AND WALES *v.* LAMBARDE.

Sheriff—Interpleader—Money in Hands of Sheriff—Money to abide Order of Court—Right of Sheriff to retain Money till Order.

A sheriff who had seized goods in execution interpleaded, and an order was made transferring the interpleader proceedings to the county court, the claimants to be at liberty to pay a sum of money to the sheriff, for the release of the goods, "to abide the order of the county court." The money was paid by the claimants to the sheriff, and the proceedings were transferred to a county court. Before the trial of the issue the execution creditor abandoned his claim, and the claimants obtained judgment in the county court, but did not obtain an order as to the money in the hands of the sheriff. The claimants demanded the money from the sheriff, and, on his refusal to pay it, brought an action against him for money had and received to their use:—

Held, that, the sheriff, holding the money under an order of the High Court, was not bound to pay it over without an order of the county court, and that the action could not be maintained.

APPLICATION by the defendant to enter judgment or for a new trial, in an action tried before Charles, J.

The action was brought to recover 53*l.* in the hands of the defendant as sheriff. The defendant was directed to levy under a fi. fa. on the goods of a judgment debtor at the instance of an execution creditor. He accordingly seized certain goods which were claimed by the present plaintiffs under a bill of sale. Notice of the claim was given to the defendant, who thereupon took out an interpleader summons. At the hearing of the summons an interpleader issue was directed between the claimants and the execution creditor, and an order was made transferring the proceedings to the county court; and it was further ordered, that, upon payment by the claimants of 53*l.* and possession money, the sheriff should withdraw; that if the money was not paid, the sheriff should sell, and that the sum of 53*l.*, or the proceeds of the sale, as the case might be, should abide the order of the judge of the county court, and that no action should be brought against the sheriff for the seizure of the goods. (1) The money was paid to the defendant, and the proceedings transferred

(1) See Rules of Supreme Court, 1883, Appendix K, No. 56a.

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to a county court. Notice of trial was given; but before the case came on the execution creditor gave the plaintiffs notice that he abandoned his claim. The plaintiffs thereupon applied to the defendant to have the money paid over to them; but he refused to do this without an order of the Court. The plaintiffs then went before the county court judge, who ordered judgment to be entered for the claimants, but refused to make an order on the sheriff, on the ground that it was not necessary. The plaintiffs then served on the defendant a notice of the order made by the county court judge, and applied again for the money, and, on the defendant's refusal to pay it, commenced this action for money had and received.

The learned judge gave judgment for the plaintiffs, and the defendant appealed.

Dickens, Q.C., and *Gore*, for the defendant. The sheriff is in possession of the money as if he were a receiver, and he cannot part with it without an order of the Court. The mere decision in favour of the claimants is no guide to the sheriff as to what he is to do with the money, and he cannot be bound either to inquire into the arrangement made by the parties, or to incur the danger of acting on the notice without inquiry.

Blake Odgers, Q.C., and *Brooke Little*, for the plaintiffs. It is true that no action of trespass can be brought against the sheriff; but that does not deprive the person entitled to the money of his action for money had and received. There has been a sufficient order of the county court; for if the claimants are entitled to judgment in the county court, they are entitled to the fruits of it.

[They referred to *Swain* v. *Morland*. (1)]

LORD ESHER, M.R. In this case the sheriff was directed to seize the goods of the judgment debtor, and he accordingly seized certain goods which other persons have come forward to claim. The sheriff has no means of determining to which party the goods belong, and so the law permits him to come to the Court and ask that the dispute shall be determined. The

(1) 1 B. & B. 370.

moment he has an interpleader order he is protected, and the Court has to decide between the parties. If the judge before whom the case comes is clear as to the ownership of the goods, he makes an order at once, either in favour of the execution creditor or the claimant; but if there is any reasonable doubt, he forms an issue to satisfy himself on this point, and to enable him to deal with the whole matter. The issue is tried, and if there is anything in the course of the trial which can be the subject of an appeal, there may be an appeal; but if there is nothing of that sort, the case used to go back to the judge at chambers, who looked at the result of the trial, and ordered what should be done, and dealt with all the rights of the parties in the case. That practice has been settled for years, and the Judicature Acts made no real difference in the practice, except that the judge who tries the issue may dispose of the whole matter. Under the 17th section of the Judicature Act, 1884, power is given within certain limits to transfer interpleader proceedings to a county court, and the form of this order is 56*a* in Appendix K to the Rules of the Supreme Court, 1883. That is an order of the High Court; and in this case such an order was made, and it was directed that the sum of 53*l.*, or the proceeds of the sale of the goods, should abide the judgment of the county court. The matter would then go in the ordinary course to the judge of the county court, who would have to dispose of the remainder of the proceedings, and determine the issue. That was not required in the present case, for the execution creditor gave up his claim. The matter then stood in this way—that the sheriff was protected, and that as between the parties the goods were admittedly those of the claimants, and consequently the money in the hands of the sheriff, which represented the goods, was their property. Under these circumstances the sheriff had a right, before he parted with the money, not necessarily to a separate order, but to a specific order to pay over the money. The county court judge, in my opinion, ought to have made such an order. The order on an interpleader summons, when the claim is established, is No. 188 of Appendix 2 to the County Court Rules, 1889, and it declares that it is adjudged that the goods taken in execution belong to the

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Lord Esher, M.R.

claimant. In this case the order ought to have declared further that the money in the hands of the sheriff was the property of the plaintiffs in the interpleader issue, and directed the sheriff to pay it over. If the sheriff has to pay the money in the absence of such an order, that would throw on him a very serious burden. The sheriff in this case has acted within his rights, and the plaintiffs have brought their action against him without any right to say that he has done anything which entitles them to do so. I disagree, therefore, with the conclusion to which the learned judge came, and the appeal must be allowed and judgment entered for the defendant.

BOWEN, L.J. The sheriff appears to me from first to last to have done nothing to justify this action. He is sued for money had and received because he did not pay over the money he held without an order of the county court. It is necessary for the plaintiffs to shew that they are entitled to payment over of the money to them, and the way they endeavour to do so is by saying that the sheriff was a trespasser when he took the goods, and that, as they are willing to waive the tort and accept the money from him, he is bound to pay it over at once. This argument gave the go-bye to the machinery of interpleader proceedings which has been devised for the protection of sheriffs. After the interpleader order in the High Court which directed the transfer of the interpleader proceedings to the county court, the sheriff no longer held the money as proceeds of a trespass, but as the officer of Court, and under an obligation to pay it over on the order of the county court.

The object of an interpleader order is to try the title to the goods at the time of seizure, and the determination of that issue, if it is tried, enables the Court to make an order determining the rights of the parties. Here the execution creditor struck his colours and acknowledged the title of the claimants at the time of seizure. There still remained the administrative process to the carrying out of which the determination of the issue is a preliminary step, and the sheriff still held the money under the order of the High Court until an order of the county court should direct him how he was to

dispose of it. If the matter were otherwise, the sheriff would be placed in a position of great difficulty in having to determine whether the parties had agreed on the matter and whether proceedings taken behind his back had concluded it. No such duty is cast on him, and he is entitled to wait until he gets an order which relieves him from all further responsibility. The county court judge should have taken the ordinary form of order applicable to the case of a claimant who establishes his claim to goods seized, and moulded it carefully so as to carry out the order of the High Court.

KAY, L.J., concurred.

Appeal allowed.

Solicitors for plaintiffs: *Steadman, Van Praagh, Sims & Co.*
Solicitors for defendant: *Palmer & Bull.*

A. M.

[IN THE COURT OF APPEAL.]

HILL AND ANOTHER, APPELLANTS; THOMAS, RESPONDENT.

Highway — Repair — Excessive User of Road — Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—"*Extraordinary Traffic.*"

Sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, gives power to a road authority, where extraordinary expenses have been incurred by such authority in repairing a highway "by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon," to recover the amount of those expenses from the person by whose order the weight or traffic has been conducted:—

Held, that the expression "extraordinary traffic" in s. 23, as distinct from "excessive weight," includes all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair. "Extraordinary traffic" is a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and thereby to cause damage and expense beyond what is common.

The mere user of the road, however, by one person more than others does not constitute "extraordinary traffic," even though it be his own user which has produced the damage to the road; the traffic must be extraordinary as

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regards the ordinary user of the road by all who use it, and not merely large as regards the traffic put on it by other persons.

Pickering Lythe East Highway Board v. *Barry* (8 Q. B. D. 59) overruled.

APPEAL from the decision of the Queen's Bench Division upon a case stated by two justices of the peace of the county of Pembroke under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

On April 23, 1892, the respondent, who was the surveyor of the Pembroke District Highway Board, certified, in pursuance of the provisions of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), that, having regard to the average expenses of repairing a highway and road called "Angle Road," in the parish of Angle in the county of Pembroke, situate within the district of the highway board, and being a highway repairable by the inhabitants at large, extraordinary expenses amounting to 125*l.* had been incurred by the highway authority in repairing such highway by reason of the damage caused by excessive weight passing along the same and extraordinary traffic thereon conducted by or by the orders of the appellants from January 14, 1890, until and including the month of April, 1892.

The appellants, having refused to pay the road authority the sum named in the certificate, were summoned to appear before the justices, sitting as a court of summary jurisdiction at petty sessions, upon the complaint of the surveyor. The proceedings were taken under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, which enacts: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

The case stated that the following facts were proved before the justices at the hearing of the complaint:—

1. The Pembroke District Highway Board is the authority liable to repair the public highways in the parish of Angle, and has repaired them up to the present time.

2. The road in question is within the said parish, and is a public highway repairable by the inhabitants at large, and not a main road, and runs from the seashore at Angle Bay to and beyond a Government road branching thereout at right angles, and leading to the Government fort known as "Chapel Bay Fort," and is a road 1260 yards long, and on an average four yards wide, and is generally called or known as the "Angle Road," and was, previously to the appellants' traffic being brought over it, in fairly good repair suitable to the ordinary traffic thereon. Such ordinary traffic consisted of agricultural produce and materials and the conveyance of bricks from an adjacent brickworks belonging to and worked by a Mr. Mirehouse, against whom a similar complaint had been preferred in respect also of damage done by him to the said Angle Road by the carriage of materials for the construction of a pier which he was building on the seashore hereinbefore mentioned.

3. In January, 1890, Messrs. Hill, the appellants, commenced, under a contract with the Government, the construction of a battery for the Government at Chapel Bay Fort. Their materials, consisting of shingle and cement, were brought by the appellants to Angle Bay in barges, and carted from there over the road in question. The total quantity of such materials was 8051 tons, carted in 9000 loads, being a very great addition to the usual total traffic along the same.

4. The appellants carted a small portion of the said building materials with their own horse and cart. The rest of such materials were carted in the local farmers' ordinary agricultural carts drawn by the farmers' horses, and generally in charge of the farmers' men.

5. During the period from January, 1890, to April, 1892, the traffic over the road in question consisted, in addition to that brought on it by the appellants, and to the ordinary agricultural traffic, of the brick traffic of Mr. Mirehouse, and the user of his

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traction engine and trucks for carting of materials by him for the building of the pier (such carting traversing the whole extent of the road in question) and also of three Government guns (intended for the fort), each weighing eighteen tons, drawn by Mr. Mirehouse's traction engine, together with heavy gun carriages and slides. It was proved, however, that the traction engine, by reason of the width of its wheels, did no damage to the road.

6. During the said period the road was very considerably cut up, and damaged in an extreme degree. It appeared that of the total building materials carried over the road in question during the time under our consideration, about three-fourths were carried by the appellants and one-fourth by Mr. Mirehouse. The respondents gave evidence that the average ordinary expense of the repair of highways in the neighbourhood of the parish of Angle amounted to 6*l.* 5*s.* 10½*d.* per mile, and that of the highways within that parish, which are all called and known by the name of the "Angle Road," and are nine miles in extent, did not exceed the amount of 3*l.* 16*s.* 4*d.* per mile, and proved that extraordinary expenditure had been incurred in respect of the highway in question, and had been paid for by the said board, caused by the unusual traffic hereinbefore mentioned, and that such extraordinary expenditure amounted to the sum mentioned in the certificate of the respondent as such surveyor as aforesaid.

It was contended by the appellants' solicitor (inter alia) that on the facts proved there was no proof of excessive weight or extraordinary traffic within the meaning of the Act of Parliament.

The justices found that the traffic was conducted by the order of the appellants, and under their control, and that none of the carts containing the appellants' materials carried greater weights than those usually carried for agricultural and other purposes in the neighbourhood. They were, therefore, of opinion that there was no proof before them of excessive weights having been carried over the highway by the appellants otherwise than by the great increase of carting mentioned in the case, but they stated that they regarded the traffic, as being carried on for the unusual purpose of building a Government fort, as extraordinary, and they

held the appellants liable, and assessed the extraordinary expenses at 105*l.*, exclusive of the expenses caused by the other traffic, alleged to be extraordinary, mentioned in the case.

The questions for the opinion of the Court were whether the facts stated justified the findings of the justices, and whether the contention made for the appellants was entitled to succeed.

The Divisional Court (Vaughan Williams and Bruce, JJ.) gave judgment for the appellants, on the grounds that the justices had found the weight of the individual carts in which the materials were carried along the road not to be excessive; that they had not found that the aggregate weights carried were excessive, or that the materials were not such as were ordinarily carried along the road in question, but they had wrongly arrived at the conclusion that the traffic was extraordinary merely because it was for an unusual purpose. The learned judges were of opinion that the carrying of material ordinarily carried along the road in carts not excessive in weight, in a quantity which in the aggregate was not found to be excessive, did not constitute extraordinary traffic merely because the purpose for which the materials were carried was unusual.

The surveyor, by leave, appealed.

Manisty, for the appellant in the Court of Appeal. The learned judges in the Court below did not sufficiently take into account the statements in the case. From those statements it appears, first, that the material used by the contractors and carried over the road was of an unusual character; secondly, that the amount of materials carried was in excess of what was usually carried over the road; and, thirdly, that the purpose for which the materials were carried was unusual. Whatever may be the exact definition of the words, it is clear that, where those three conditions exist the traffic is "extraordinary traffic" within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878. That section deals with "extraordinary traffic" as being something distinct from "excessive weight"; so that in determining whether there is extraordinary traffic the element of excessive weight put upon the road at any one time

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need not be considered. If that be so, it is difficult to see what could be extraordinary traffic if this was not. The decision of the justices was given with regard to all the facts stated in the case; they did not, as the learned judges in the Court below seem to have thought, rely upon the unusual purpose only. In *Williams* v. *Davies* (1), which was a decision upon the question of "extraordinary traffic," Lush, J., pointed out that the object of the statute was that a person who used the road above his fellows should bear the expense of the damage caused thereby to it. In *Lord Aveland* v. *Lucas* (2), Grove, J., seems to have been of opinion that the weight and character of the traffic was the test, not the amount of user to which the road was subjected. Lindley, J., said that "extraordinary traffic" meant extraordinary having regard to the ordinary use and traffic upon and over the road. The Court of Appeal (3) affirmed the decision of the Court below, but there is nothing in the judgments with respect to the exact point in question here. *Wallington* v. *Hoskins* (4) is distinguishable from the present case, because the justices found that the carriage of stone was an ordinary and recognised industry of the neighbourhood. *Reg.* v. *Williamson* (5) is also distinguishable on the same ground. In *Pickering Lythe East Highway Board* v. *Barry* (6) the Queen's Bench Division refused to disturb the justices' findings of fact; but the language used by Grove and Lopes, JJ., in their judgments, is inconsistent with the views taken by the learned judges in *Williams* v. *Davies* (1); *Reg.* v. *Ellis* (7); and *Whitebread* v. *Sevenoaks Highway Board*. (8) In nearly all these cases there was the element of excessive weight, and in none of them has the precise point arising in this case been determined. On the facts stated in this case it is submitted that the justices came to a right conclusion.

Roskill, (*C. M. Atkinson*, with him), for the respondents in the Court of Appeal. The decision of the Court below was right. The facts stated in the case do not establish "extraordinary

(1) 44 J. P. 347.
(2) 5 C. P. D. 211.
(3) 5 C. P. D. 351.
(4) 6 Q. B. D. 206.
(5) 45 J. P. 505.
(6) 8 Q. B. D. 59.
(7) 8 Q. B. D. 466.
(8) [1892] 1 Q. B. 8.

traffic" within the meaning of those words in s. 23. The case finds that the road in question was used in the ordinary way with carts of no unusual or extraordinary size or weight. There is no authority for the proposition that a repetition of the user can of itself constitute extraordinary traffic. *Reg.* v. *Williamson* (1) is a strong authority against it. In that case, and in *Wallington* v. *Hoskins* (2) and *Pickering Lythe East Highway Board* v. *Barry* (3), the traffic was held not to be extraordinary on facts which were stronger than those in the present case to shew an excessive user of the roads. The facts here shew that a fort existed before the traffic in question was brought on the road; that traffic, therefore, cannot be said to be extraordinary in the sense that its purpose was unusual in the neighbourhood; and though a similar amount of traffic may not occur again for some time, that would not be sufficient to make the traffic extraordinary, because to be ordinary the traffic need not be continuous; it may be intermittent: *Raglan Highway Board* v. *Monmouth Steam Co.* (4) No case has gone so far as to say that a large or unusual amount of the ordinary traffic of the neighbourhood will constitute "extraordinary traffic" within the meaning of s. 23. *Williams* v. *Davies* (5) is distinguishable from this case, because there the individual loads were excessive in weight. Having regard to the fact that the fort already existed, the materials carried over the road cannot be said to be unusual; and, assuming the volume or amount of the traffic to have been unusual, an unusual volume or amount of the ordinary traffic of the neighbourhood, carried over the road for a purpose not unusual in the neighbourhood, does not constitute "extraordinary traffic": *Reg.* v. *Williamson.* (1)

Manisty, replied.

Cur. adv. vult.

Aug. 10. The judgment of the Court (Lord Esher, M.R., Bowen and Kay, L.JJ.) was read by

BOWEN, L.J. The most important question we have to consider is the true meaning to be placed on the words "damage

(1) 45 J. P. 505.
(2) 6 Q. B. D. 206.
(3) 8 Q. B. D. 59.
(4) 46 J. P. 598.
(5) 44 J. P. 347.

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caused by extraordinary traffic." We may begin by observing that the object of the section is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road on the right shoulders—namely, upon those who caused the damage and to whose benefit it enured. The section, in the second place, distinguishes between "excessive weight" and "extraordinary traffic." The damage done by "extraordinary traffic" may, therefore, in the eyes of the legislature, differ from that done by "excessive weight." Traffic, thirdly, is a nomen collectivum—a collective term—a noun of multitude. It does not, like "excessive weight," apply merely to the cargo carried by a single vehicle; it is large enough to include the continuous or repeated user of the road by various vehicles belonging to one owner. Finally, extraordinary traffic, according to the plain use of language, is traffic which is not of the common order of traffic. And, taking all these considerations together, and especially when we remember that the object of the section is to provide for the expense of such extraordinary traffic as does damage to a highway, we shall arrive at the following result—viz., that "extraordinary traffic," as distinct from "excessive weight," will include all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair. Why should the singularity of the product carried, or the singularity of the purpose for which it is carried, be the sole criterion of the applicability of a section the scope of which is what we have said? To confine it in this way would be to deprive the legislation of half its practical value, and arbitrarily to limit it to a few cases of user not a whit more deserving of relief than others. It is true that extraordinary traffic is a traffic to be specifically distinguished from other traffic by the section; but the distinction cannot solely depend on the unusual character of articles carried, but rather on the effect which the carriage of the particular articles—call them by whatever name or classification one will—may presumably be expected to have upon the road. If so, extraordinary traffic is really a carriage of articles over the road, at either one or more times, which is so ex-

ceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common. Under this wider interpretation the section becomes consistent and reasonable. If it be an exceptional user of the highway that really has caused the mischief, why should the relief be given only in cases of articles of an exceptional quality or nature, and not to all exceptional cases whatever which increase the burden of the road, especially when we bear in mind that extraordinary traffic is treated by the Act of Parliament as a different thing from excessive weight, and that the term "extraordinary" is used earlier in the section as applicable to what is unusual in amount? Let us take some of the obvious instances which (upon such a construction) will fall within the section. A contractor builds a large house, or factory, or church, and by so doing temporarily increases the user of the road in a way that ends by damaging the road itself. Why should he not pay for the extra use of the road? It is argued that he ought not to pay because he is only using the road in a lawful way. If he used it in any other way he would be indictable for a nuisance. But this section of the Act of Parliament, as we have seen, is not intended only to prevent unlawful user; it applies also to damage caused by legitimate and proper user: see per Baggallay, L.J., in *Lord Aveland* v. *Lucas*. (1) It is argued that he is only carrying over the road the same substance as that which other people ordinarily carry. Here, again, the answer is that the section is not penal, but remedial and recuperative, and that it is because, though he carries ordinary articles, he does not carry them in the manner or on the limited number of occasions in and on which other people carry them, and because the frequency of his travels over the road has caused the special mischief to the road, that such frequency constitutes in itself a reason why he should pay more than his neighbour. Such an interpretation, which makes the relief commensurate with the damage done and places it on the shoulders which actually cause the damage,

(1) 5 C. P. D. 211; 5 C. P. D. 351.

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gets rid of all the minute discussions as to whether the cargo carried is or is not of a nature ordinarily carried in the neighbourhood, the nature of the cargo and purpose for which it is carried being matters that may indeed throw light on the user of the road, and thus have a bearing on the question whether the traffic is or is not extraordinary, but which do not form any absolute factors in the definition of "extraordinary traffic." It is, however, important to recollect that the section does not mean that a man is to be mulcted merely because he uses a road more than others do, even if it be his own user which has produced the mischief to the road. The traffic must be extraordinary as regards the ordinary user of the road as a whole by all who use it, and not merely large as regards the traffic put on the road by other persons. Such is the conclusion as to the meaning of the section at which one would reasonably arrive independently of decided cases. Is there anything in the state of the authorities that tends to a different view? The first case to be noticed is that of *Williams* v. *Davies*. (1) The defendant had bought timber near a railway station which was conveyed in wagons in sixty-seven loads between Christmas and March. The timber was purchased in the ordinary course of business, but the sixty-seven loads of timber were a greater number of timber-loads than usually passed over the roads in question in three consecutive months, and the heavier loads were heavier than the loads of ordinary agricultural produce. The magistrates held that the sixty-seven loads of timber were in the aggregate excessive weight and extraordinary traffic. The Court of Queen's Bench (Lush and Bowen, JJ.) held that the justices were right. "What the traffic was to be compared with," said Lush, J., "was the ordinary traffic along the road," and the fact that the timber was the natural produce of the land did not prevent the traffic being held as extraordinary. In *Lord Aveland* v. *Lucas* (2) all that was determined was that a traction engine drawing two wagons for the carriage of materials and goods used for ordinary purposes on the estate of the defendant was not prevented from being extraordinary traffic by the fact that

(1) 44 J. P. 347. (2) 5 C. P. D. 211; 5 C. P. D. 351.

the engine was of less weight than was allowed by the Act and had its wheels constructed in conformity with the Act. Grove, J., indeed, thought that the weight and character of the traffic, not the amount of the user to which the road is subjected, was the criterion. This was not necessary for the decision in the case. But Lindley, J., considered that the words "extraordinary traffic" meant extraordinary with reference to the ordinary use and traffic upon and over the road. In the Court of Appeal the judgment was affirmed, but no expressions were used which in any way directly determine the precise point now in question, except that the Court point out (see per Baggallay, L.J.) that the Act of Parliament is intended to apply to cases where the user of the road has been rightful and legitimate. In the case of *Wallington* v. *Hoskins* (1), Lord Coleridge, C.J., and Field, J., held that the traffic was not extraordinary, and affirmed this portion of the finding of the justices. The justices had also found that the weights were excessive, and this portion of their order the Court reversed. But the traffic in question consisted in the carriage of stone in heavy loads; with respect to this the justices found that the carriage of stone was an ordinary and recognised industry of the place, and do not appear to have found that it was carried in any unusual manner or quantity, even as regarded the particular roads in question. It is difficult to see that the case in any way governs the present, and Lord Coleridge, C.J., adopts the view of Lindley, J., in *Lord Aveland* v. *Lucas* (2), that "extraordinary" is a term used with reference to the ordinary use and traffic on the road. In *Reg.* v. *Williamson* (3), the respondent, who was owner of ironstone mines, sent his traffic to the railway station in carts of the ordinary size and weight, but which made about seventy journeys a day. The other traffic was agricultural and very small. It was held by Grove and Lindley, JJ., that the justices were wrong in finding that the defendant caused extraordinary traffic merely because he had many carts to send. It is not clear that the traffic in question was found by the justices to be anything beyond what the road was

(1) 6 Q. B. D. 206. (2) 5 C. P. D. 211; 5 C. P D. 351.
(3) 45 J. P. 505.

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accustomed to bear, although the greater portion of the traffic on the road was no doubt produced by the appellant. If the justices had found the traffic caused by the defendant to be beyond the ordinary user of the road, and to have occasioned the damage, their finding, we think, would have been correct and ought not to have been disturbed. We do not, however, see clearly that the justices did so find. "I am disposed to say," says Lindley, J., "that there may be cases where the use of the highway is so frequent and incessant as to amount to extraordinary traffic. Nevertheless, the mere fact that one person uses a highway more than another is no reason for calling it extraordinary traffic on the part of that person." In *Pickering Lythe East Highway Board* v. *Barry* (1), materials for building a house were carried by the defendant over a highway the ordinary traffic of which was agricultural traffic. For several months carts containing heavy building materials were almost daily on the road, and the weight of the loads was such that the drivers of the carts when going downhill were frequently obliged to adopt exceptional means to take the strain off the horses. Here was a case in which beyond all question the damage done to the highway by the traffic would, according to the view suggested as the proper construction of the Act, have been done by extraordinary traffic. The justices, however, considered that s. 23 of the Act did not apply in a case where the damage was caused by an extraordinary quantity of traffic which differed not materially in character but chiefly in its weight and amount from the traffic to be expected on the highways, citing the authority of Grove, J., in *Lord Aveland* v. *Lucas*. (2) The Queen's Bench Division (Grove and Lopes, JJ.), refused to disturb their finding. "The traffic," says Grove, J., "was in this case only a greater amount of the same traffic as was used before on the road." "I think," says Lopes, J., "the legislature intended something unusual in weight, or extraordinary in the kind of traffic, either as compared with what is usually carried over roads of the same nature in the neighbourhood, or as compared with that which the road in its ordinary and fair use may

(1) 8 Q. B. D. 59. (2) 5 C. P. D. 211; 5 C. P. D. 351.

be reasonably subjected to. It would not be sufficient to compare the weight and traffic complained of with traffic usually carried on the particular roads; it might be the traffic was usually of the lightest kind, but surely the legislature never intended that a man was not to use the road for carrying materials for building a dwelling-house, farmhouse, or barn, provided he used it in a reasonable way for those purposes." There is a difficulty in reconciling this language with the decision in *Williams* v. *Davies* (1), and it seems to us, with deference, that Lopes, J., assumed without sufficient justification that the object of the legislature was to prevent extraordinary traffic, whereas its only object is to throw on the person who causes such traffic the duty to pay for the damage it does the road. If this is the true view, the question is not what is a reasonable use of the road, but what is its ordinary use. It would seem, therefore, that the decision in the *Pickering Case* (2) is based on an imperfect view of the Act of Parliament. In *Raglan Highway Board* v. *Monmouth Steam Co.* (3), there were large woods which came to maturity in a group of twenty parishes after ten to seventeen years' growth. One or other wood was cut every year, and the timber hauled over one or other highway each winter. The justices found that the traffic was not extraordinary, it being the ordinary trade of the district carried on in the ordinary manner. This decision was affirmed by the Queen's Bench Division (Grove, Lopes, and Bowen, JJ.). In *Reg.* v. *Ellis* (4) the road was broken down by a traction engine with trucks, which made several days two journeys a day upon it. It was held by Field and Bowen, JJ., that the traffic was extraordinary traffic. In *Whitebread* v. *Sevenoaks Highway Board* (5) the expenses were incurred in consequence of stone having been carted by the defendant from a quarry along the road, which was an ordinary country road, used for ordinary light country traffic, and which had never been adapted for, or made up to bear, heavier traffic. Stone traffic was a recognised business in the neighbourhood, but was not the ordinary or recognised traffic of the road in

(1) 44 J. P. 347.
(2) 8 Q. B. D. 59.
(3) 46 J. P. 598.
(4) 8 Q. B. D. 466.
(5) [1892] 1 Q. B. 8.

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question. It was held by Mathew and A. L. Smith, JJ., that the justices were right in finding the traffic to be extraordinary. This case seems to us not to be reconcilable with the decision of Grove and Lopes, JJ., in *Pickering Lythe East Highway Board* v. *Barry* (1), and A. L. Smith, J., appears to have dissented from the language used by Lopes, J., in the last-mentioned case. In this state of the authorities, and in the absence of any decision by the Court of Appeal, it may be assumed that we are entitled to deal with the section upon principle, and it is certainly desirable to lay down for the future some clear and intelligible canon which shall guide the magistrates in their interpretation of the law; and for the reasons given above the true interpretation appears to be that which has been already explained. It remains to be considered what is the true effect of the magistrates' finding in this case. The ordinary traffic of the road in question before the respondents' traffic was brought over it consisted of agricultural produce and materials, and the conveyance of bricks from an adjacent brickworks by Mr. Mirehouse. In January, 1890, the respondents began to construct a battery at a Government fort. Their materials consisted of shingle and cement, which the respondents brought by sea in barges and carted over the road in question. The justices found that the total quantity of the materials was a very great addition to the usual total traffic, and that the road was cut up and expenditure incurred in consequence of this unusual traffic. On the facts stated the justices were of opinion that none of the carts conveying the respondents' materials carried greater weights than those usually carried for agricultural and other purposes in the neighbourhood, and, therefore, that there was no proof before them of excessive weights having been carried over the highway by the respondents otherwise than by the great increase of carting hereinbefore mentioned, but regarded the traffic, as being carried on for the unusual purpose of the building of a Government fort, as extraordinary. If by this the magistrates meant to find, as we rather gather that the Divisional Court believed, that the purpose for which the traffic was called into existence being unusual the

(1) 8 Q. B. D. 59.

traffic must necessarily be extraordinary within the meaning of the Act, it would be difficult to justify their decision. But exceptional purposes may have a tendency to produce and may explain and account for exceptional traffic; and in that sense the unusual character of the object may bear on the question of increase of traffic. Taking the case stated by the justices in its fair and obvious meaning, we think that the justices found, and meant to find, that there was an exceptional increase of traffic produced by a cause which, being itself exceptional, explained and accounted for such increase, and that the increase of traffic was one that damaged the road and gave rise to extra expense. This seems to justify their finding that the traffic was extraordinary within the meaning of the Act. Their decision, therefore, appears correct, and the appeal ought to be allowed, with costs here and below.

Appeal allowed.

Solicitors for the appellant in the Court of Appeal: *Field, Roscoe, & Co., for Hughes Brown, Pembroke Dock.*

Solicitors for the respondents: *Bridges, Sawtell, Haywood, Ram, & Dibdin, for F. J. Bendall, Milford Haven.*

W. A.

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF THE POOR OF THE CITY OF NORWICH *v.* BOLINGBROKE AND OTHERS.

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Justices—Jurisdiction—Disqualification by Interest—Appeals against Poor-rates—Special Sessions—16 *Geo.* 2, *c.* 18, *ss.* 1, 3—27 & 28 *Vict. c.* 39, *s.* 6.

By 16 Geo. 2, c. 18, s. 1, justices of the peace for any county, riding, city, borough, &c., may do any act appertaining to their office concerning parochial taxes, levies, or rates, notwithstanding that they are themselves rated to or chargeable with the taxes, levies, or rates within any parish, township, or place affected by such act. By s. 3, nothing contained in the Act shall authorize any justice for any county or riding at large to act in the determination of any appeal to quarter sessions from any order, matter, or thing relating to any parish, township, or place where such justice is charged, taxed, or chargeable as aforesaid. By s. 6 of 27 & 28 Vict. c. 39, no justice of the peace shall be disqualified for acting in the determination of any appeal against a poor-rate at any quarter or special sessions by reason of his being rated, or

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THE QUEEN v. BOLINGBROKE.

being liable to be rated, in some other parish in the union than that for which the rate appealed against is made:—

Held, that s. 1 of 16 Geo. 2, c. 18, gave the justices of a corporate city, sitting at special sessions, jurisdiction to hear an appeal against a poor-rate, notwithstanding they were rated to the relief of the poor in the parish for which the rate appealed against was made, and that s. 6 of 27 & 28 Vict. c. 39, did not impliedly take away that jurisdiction.

RULE calling upon certain justices of the city of Norwich and J. J. D. Paul to shew cause why a writ of certiorari should not issue to bring up, for the purpose of quashing it, an order made by the justices at a special session held by them for the purpose of hearing appeals against poor-rates.

J. J. D. Paul, having objected before the assessment committee of the parish of Norwich to his assessment to the poor-rate in a valuation list made by the guardians of the poor of the Norwich Incorporation, the assessment committee confirmed his assessment. Paul thereupon appealed to the special sessions, and on the hearing of the appeal the guardians appeared and objected to the jurisdiction of the justices at special sessions on the grounds—(1.) that the appeal was too late because it was not made to the next practicable sessions, and (2.) that the justices at special sessions were disqualified as being ratepayers of the parish of Norwich. The justices overruled the objection, and, having heard the appeal, reduced the appellant's assessment. This rule was thereupon obtained on behalf of the guardians. It was stated in an affidavit used in support of the rule that the justices in question were ratepayers of the parish of Norwich (which was conterminous with the city of Norwich), and as such interested in the result of the appeal.

Macmorran, (*Ernest Wild*, with him), for the justices, shewed cause against the rule. The question whether the justices were disqualified depends upon 16 Geo. 2, c. 18, and 27 & 28 Vict. c. 39, s. 6. (1) The justices at special sessions for the city of

(1) By s. 1 of 16 Geo. 2, c. 18, it shall be lawful for every justice of the peace for any county, riding, city, liberty, franchise, borough, or town corporate to do within his jurisdiction any act appertaining to his office as justice of the peace, so far as the same relates to the laws concerning parochial taxes, levies, or rates, notwithstanding such justice of the peace is

Norwich are within s. 1 of 16 Geo. 2, c. 18. Special sessions are only a special meeting of petty sessions. Sect. 6 of 27 & 28 Vict. c. 39, does not affect the jurisdiction given by the Act of Geo. 2; it is only intended to apply to s. 3 of that Act, and to remove the disqualification of county justices under s. 3 when they are hearing rating appeals from parishes other than the one in which they are rated. If the opposite view were taken, it would become impossible to hold special sessions in cities and boroughs. [He referred to *Rex* v. *Justices of Essex*. (1)]

Poland, Q.C. (*Poyser*, with him), for the guardians of the poor of the parish of Norwich, supported the rule.

CAVE, J. I ought to say that, as to the question of the jurisdiction of the justices at special sessions, I entertain no doubt that they had jurisdiction under 16 Geo. 2, c. 18, s. 1, and that the jurisdiction so given to them is not affected by the provisions of s. 6 of 27 and 28 Vict. c. 39. That section does not in terms take away the jurisdiction, nor does it by any necessary inference. I think Mr. Macmorran's argument was well-founded on that point. Sect. 6 was passed with reference to s. 3 of the Act of Geo. 2, and does not apply to the jurisdiction given by s. 1. I am therefore of opinion that the justices at special sessions had the jurisdiction they claim to exercise, and I do not for a moment suppose that in hearing the case they would be in the slightest degree affected by the fact that some of them pay poor-rates in Norwich.

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rated to or chargeable with the taxes, levies, or rates within any parish, township, or place affected by any such act of the justice. Sect. 3 provides that nothing in the Act shall authorize any justice of the peace for any county or riding at large to act in the determination of any appeal to quarter sessions for any such county or riding from any order, matter, or thing relating to any such parish, township, or place where such justice is taxed or chargeable as aforesaid, anything therein contained to the contrary notwithstanding. By s. 6 of 27 & 28 Vict. c. 39, "No justice of the peace shall be disqualified from acting in the determination of any appeal against a poor-rate at any quarter or special sessions by reason of such justice being rated, or being liable to be rated, in some other parish in the union than that for which the rate appealed against is made."

(1) 5 M. & S. 513.

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WRIGHT, J. I am of the same opinion. The only importance of the question is that some of the text-books seem to state the law in a contrary sense. So far as petty and special sessions are concerned, I am of opinion that justices are not disqualified from doing the poor-law work by reason of their paying poor-rates in the place in respect of which the work is done. As to quarter sessions, it appears to me that the only disqualification is with respect to their own parish.

Rule discharged. (1)

Solicitors for prosecutors: *G. F. Hudson, Matthews, & Co., for Cross, Barnard, & Cross, Norwich.*

Solicitors for justices: *Crowders & Vizard, for W. R. Cooper, Norwich.*

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[IN THE COURT OF APPEAL.]

MONTAGU *v.* FORWOOD.

Principal and Agent—Contract with Agent for undisclosed Principal—Set-off against Principal of Debt due from Agent—Estoppel.

The plaintiffs, who were acting for the owners of a cargo, employed B. & C. as their agents to collect from underwriters contributions in respect of a general average loss. B. & C., not being brokers, employed the defendants, who were brokers at Lloyd's, to collect the money, and they did so. At the time when the defendants received the money there was a debt due to them from B. & C. The defendants did not know, and there was nothing, as the Court held, to lead them to suppose, that B. & C. were not acting as principals in the matter, and the defendants believed that B. & C. were acting as principals:—

Held, that the principle of *George* v. *Clagett* (7 T. R. 359) and *Fish* v. *Kempton* (7 C. B. 687) applied; that the defendants were entitled to stand in the position in which they would have stood if B. & C. had really been principals; and that, consequently, the defendants were entitled to set off against the demand of the plaintiffs for the money which they had collected the debt due to them from B. & C.

APPEAL by the plaintiffs against the judgment of Day, J., at the trial of the action without a jury, for the defendants.

(1) The guardians had given notice of appeal to quarter sessions against the decision of the justices at special sessions, and that appeal was pending. Under those circumstances the rule was discharged by consent, it being agreed that the objection as to the appeal to special sessions not having been brought to the next practicable sessions should be waived, and the case heard at quarter sessions on the merits.

The action was brought to recover a sum of 52*l.* 14*s.* 4*d.*, alleged to have been received by the defendants to the use of the plaintiffs. The money in question represented the amount of a general average loss which had been collected by the defendants from underwriters at Lloyd's. The plaintiffs were bankers in London, and they had been employed by the owners of the cargo, who were entitled to the benefit of the policies, to collect the money. They employed Messrs. Beyts & Craig, who were merchants in London, not brokers, to collect the money. Beyts & Craig, not being members of Lloyd's, employed the defendants, who were brokers at Lloyd's, to collect the money for them. This was on June 16, 1892. The defendants collected the money, and, when they had done so, they claimed to be entitled to set off the amount, in account with Beyts & Craig, against a larger amount which Beyts & Craig owed them. Beyts & Craig had been adjudged bankrupts on July 8 on a petition presented on July 4. The defendants, as the learned judge held on the evidence, had no notice that Beyts & Craig were acting as agents in the matter, but believed them to be principals. On July 12 the defendants sent to Beyts & Craig a credit note for the amount, which stated that it would be receivable from the underwriters on July 19. On July 18 the plaintiffs wrote letters to the trustee in the bankruptcy and to the defendants. In the letter to the trustee the plaintiffs said that, the insurance claim not having been reported to them, "we hereby withdraw our instructions, and request you to return the documents to us." In the letter to the defendants the plaintiffs said: "We have reason to believe that you have become interested in the matter, and we now hereby request you neither to receive the money represented by above claim, nor to part with any amount you may hold on account of the above claim, except to us, the same being the property of our clients." They added that they had written to the trustee of Beyts & Craig, withdrawing their instructions to collect the claim. On July 19 the defendants replied to the plaintiffs: "We are sorry we cannot help you in this matter, as we have already credited Beyts & Craig with the amount in account current."

This action was then brought.

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The learned judge held that the action was not maintainable, because there was no privity of contract between the plaintiffs and the defendants, and that, though there was privity of property, the defendants had no notice. Judgment was accordingly entered for the defendants, with costs.

The plaintiffs appealed.

Finlay, Q.C., and *Haldinstein*, for the plaintiffs. The money collected by the defendants was the plaintiffs' money, and unless the defendants have paid it over, or otherwise changed their position, on the faith that Beyts & Craig were principals in the transaction, they cannot refuse to pay it to the plaintiffs on the ground that they have a set-off against Beyts & Craig. The trustee in the bankruptcy of Beyts & Craig would have no claim to this money, because they were not beneficially interested in it. Therefore, the defendants cannot out of it pay themselves the debt due to them by Beyts & Craig. The defendants have not altered their position for the worse on the faith that Beyts & Craig were principals. It is not like a case in which one person buys goods from another against whom he has a right of set-off, supposing him to be the principal: *Kaltenbach* v. *Lewis* (1); *New Zealand and Australian Land Company* v. *Watson* (2): *Cooke* v. *Eshelby*. (3) Trust money may be followed by the cestui que trust, even in the hands of a person who had no notice of the trust. In *In re Hallett's Estate* (4) there was privity of property; the money was that of the plaintiffs. It is admitted that the action could not be maintained if the defendants had paid the money away; but as they have not done so, the plaintiffs can sue them for their own money. The case is like that of bailor and bailee: the bailee is bound to hand over the chattel to his bailor, but he would have a good defence if the true owner of the chattel had intervened and claimed it.

[KAY, L.J., referred to *Fish* v. *Kempton*. (5)]

The plaintiffs demanded their money before the defendants had set it off against the debt of Beyts & Craig.

(1) 10 App. Cas. 617.
(2) 7 Q. B. D. 374.
(3) 12 App. Cas. 271.
(4) 13 Ch. D. 696.
(5) 7 C. B. 687.

[LORD ESHER, M.R. The right of set-off accrues the moment there are cross-debts. Can you take away the right by giving notice of your claim?]

There is a distinction between money collected by an agent for a principal and the price of goods sold by an agent; as soon as the goods are sold the price of them is a debt.

[BOWEN, L.J. How can you distinguish the present case from *George* v. *Clagett*? (1)]

There was enough to put the defendants on inquiry; and if they had inquired they would have found that Beyts & Craig were acting as agents for the plaintiffs. The bankrupts' estate would hold the money as a trustee for the plaintiffs, and, therefore, there is no right of set-off in the bankruptcy: *Forster* v. *Wilson*. (2)

Dickens, Q.C., and *Sims Williams*, for the defendants, were not called upon.

LORD ESHER, M.R. I feel no doubt about this case. The plaintiffs were directed by a foreign bank, who were acting for the owners of the cargo, to collect a general average contribution from the underwriters in England who had insured against a general average loss. The plaintiffs employed Beyts & Craig to collect the money from the insurers. Beyts & Craig, who are not brokers, in their turn employed the defendants as their agents to collect the money, the defendants being brokers at Lloyd's. Beyts & Craig did not tell the defendants that they were acting as agents for any one. Beyts & Craig were not brokers, nor had they in any way the character of persons whose business it was to act as agents for others. It was found by the learned judge as a fact that the defendants did not know that Beyts & Craig were acting in the matter as agents for any one. The defendants accordingly, acting as agents for Beyts & Craig, collected the money, and at the very time when they did so Beyts & Craig were indebted to them in a larger amount. At that very time the defendants had a right of set-off as against Beyts & Craig, though the right would not come into play until an action was brought. After the defendants had collected the

(1) 7 T. R. 359. (2) 12 M. & W. 191.

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money, and the right of set-off had accrued, the defendants, not knowing, and having no reason to suspect, and not in fact suspecting, that Beyts & Craig were acting for any principals, can the plaintiffs now intervene and say that the money belongs to them, and that the defendants were not their agents, and that the defendants cannot set off as against the plaintiffs a debt due to them from Beyts & Craig? The law of bankruptcy has nothing to do with the case. What is the law which governs it? I think it was settled by *Rabone* v. *Williams* (1), *George* v. *Clagett* (2), and *Fish* v. *Kempton.* (3)

In *Fish* v. *Kempton* (4), Wilde, C.J., said: "Where goods are placed in the hands of a factor for sale and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another." And Cresswell, J., said (at p. 693): "This is an attempt to extend the rule laid down in *Rabone* v. *Williams* (1) and *George* v. *Clagett* (2), which has now been uniformly acted upon for many years. If a factor sells goods as owner, and the buyer bonâ fide purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal. Lord Mansfield so lays down the rule distinctly in *Rabone* v. *Williams.* (1) "Where," he says, "a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has

(1) 7 T. R. 360, n.
(2) 7 T. R. 359.
(3) 7 C. B. 687.
(4) 7 C. B. at p. 691.

been long settled. The distinction between a factor and a broker is noticed by Abbott, C.J., and Bayley, J., in *Baring* v. *Corrie*." (1) In *Fish* v. *Kempton* (2) the plaintiff's goods had been sold to the defendant by a factor—that is, a person whose business it is to sell in his own name goods placed in his hands for that purpose by his principal; but the same principle applies to any one who is authorized to sell goods, or to receive money for his principal, when there is nothing to lead the person who deals with him to suppose, and he does not in fact know, that he is acting as an agent. When a person who sells goods is known by the purchaser to be a broker—that is, an agent—the case is entirely different: the purchaser cannot then set off a debt due to him from the broker against the demand of the principal. Beyts & Craig were not brokers, and the defendants had no reason for supposing that they were acting for a principal. They acted as if the moneys which were to be collected would, when collected, belong to themselves. It is found as a fact by the learned judge that the defendants did not know that Beyts & Craig were acting for a principal. That being so, they had a right at the moment when they received the money to set off against it a debt due to them by Beyts & Craig, and, if the plaintiffs could now intervene, they would be taking away from the defendants a valid and existing right.

BOWEN, L.J. I am of the same opinion. The Master of the Rolls has so clearly expressed the law on the subject that I have really nothing to add, beyond saying that I concur in his view. The case is, in my judgment, governed by the principle of the decision in *George* v. *Clagett* (3), by the rules of common sense and justice, and I think also by the law of estoppel. The principle is not confined to the sale of goods. If A. employs B. as his agent to make any contract for him, or to receive money for him, and B. makes a contract with C., or employs C. as his agent, if B. is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C. to be acting as an agent for any one, A. cannot make a demand against C. without the latter being entitled to stand in the same position as

(1) 2 B. & A. 137. (2) 7 C. B. 687. (3) 7 T. R. 359.

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if B. had in fact been a principal. If A. has allowed his agent B. to appear in the character of a principal he must take the consequences. Here Beyts & Craig were allowed by the plaintiffs to deal with the defendants as if they had been dealing on their own account, and the defendants who dealt with Beyts & Craig are entitled to stand in the position in which they would have stood if Beyts & Craig had really been dealing as principals.

KAY, L.J. I am entirely of the same opinion. I understand that the set-off claimed by the defendants will exhaust the whole amount which they have received. I understand also that the notice by the plaintiffs to the defendants, not to part with the money to any one but the plaintiffs, did not reach the defendants until after they had received the money which they had been employed to collect. There was nothing which gave the defendants notice that Beyts & Craig were only agents, or which ought to have put the defendants upon inquiry. The defendants had a right to believe, and it is found as a fact that they did believe, that Beyts & Craig were acting in the matter as principals, and as soon as the defendants had received the money their right to set-off against Beyts & Craig accrued, and the plaintiffs cannot now deprive them of that right.

Appeal dismissed.

Solicitors: *G. E. Samuel; J. R. Greening.*

W. L. C.

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Aug. 4.

[IN THE COURT OF APPEAL.]

IN RE HILDESHEIM. EX PARTE THE TRUSTEE.

Bankruptcy—Proof of Debt—Loan to Trader—Interest varying with Profits—Subsequent Alteration of Terms—Bovill's Act (28 & 29 *Vict. c.* 86), *ss.* 1, 5—*Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *ss.* 2, 3.

By s. 5 of the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86; see now 53 & 54 Vict. c. 39, s. 3), where money is lent to a trader upon a contract in writing that the lender shall receive a rate of interest varying with the profits, the claim of such lender is, in the event of the bankruptcy of the borrower, postponed to that of the other creditors of the bankrupt; and it has been decided in *Ex parte Mills* (Law Rep. 8 Ch. 569), that an alteration of the terms of the original advance does not take the case out of the Act, unless the transaction amounts to a repayment of the advance and the making of a new loan.

On January 1, 1881, a sum of 20,000*l.* was advanced to a trader upon the terms of an agreement in writing, which provided (inter alia) that the borrower should pay to the lender interest on the 20,000*l.* at the fixed rate of 5 per cent. per annum, and also, by way of additional interest, such an amount as might be equal to one-fourth of the net profits from time to time made by the borrower in his business. Towards the end of the year 1885 negotiations took place between the lender and the borrower as to an alteration of the terms of the agreement. The borrower offered to pay off the loan, and said that he would be able to do so, because a sum of nearly 20,000*l.* would be coming to him from an insurance company on December 31, 1885. The lender replied that he did not wish to have the loan repaid. Ultimately a new agreement in writing, dated January 25, 1886, was entered into, by which the lender agreed, as from January 1, 1886, "to continue his existing loan" to the borrower of 20,000*l.* upon the terms therein contained, and the borrower agreed, in consideration of the premises, to pay to the lender interest on the 20,000*l.* at the rate of 10 per cent. per annum.

In January, 1893, a receiving order was made against the borrower, and he was afterwards adjudged a bankrupt:—

Held, that there had been nothing amounting to a repayment of the original loan, and a relending of the money upon new terms, and that consequently s. 5 of the Act applied, notwithstanding the alteration of the terms as regarded the payment of interest, and that the lender could not prove in the bankruptcy until after the other creditors had been paid in full.

APPEAL by David Hildesheim against an order of the judge of the Manchester County Court, affirming the rejection by the trustee in the bankruptcy of Hermann Hildesheim (a brother of the appellant) of a proof for a debt of 20,329*l.* 12*s.* 2*d.* tendered by the appellant in the bankruptcy. The trustee had rejected

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IN RE HILDESHEIM. EX PARTE THE TRUSTEE.

the proof on the ground that, by virtue of the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86), and the Partnership Act, 1890 (53 & 54 Vict. c. 39), the appellant was not entitled to prove until the other creditors of the bankrupt had been paid in full.

On January 1, 1881, the appellant lent the bankrupt a sum of 20,000*l.* upon the terms of an agreement in writing between them, dated December 28, 1880, by which it was agreed (inter alia) as follows:—

"(1.) D. Hildesheim agrees on the 1st of January, 1881, to advance and lend to H. Hildesheim the sum of 20,000*l.*

"(2.) H. Hildesheim agrees in consideration of the said loan to pay to D. Hildesheim interest on the said sum of 20,000*l.* at the fixed rate of 5 per cent. per annum, and also, by way of additional interest, such an amount as may be equal to one-fourth part of the net profits from time to time made by H. Hildesheim in his business of a merchant, such business to be carried on as hereinafter mentioned, and the said fixed interest of 5 per cent. to be paid by equal half-yearly payments on the 30th June and 31st December in each year, and the said additional interest to be ascertained and paid in manner hereinafter expressed.

"(3.) Subject to such right to demand earlier repayment as is hereinafter reserved to D. Hildesheim, H. Hildesheim agrees that, if D. Hildesheim, his executors, administrators, or assigns, shall, on or before the 31st day of March, 1883, give notice to H. Hildesheim to repay the principal sum of 20,000*l.* on the 31st of December, 1883, he the said H. Hildesheim will repay the said sum accordingly on the last-mentioned day, and that, if D. Hildesheim, his executors, administrators, or assigns, shall not give such notice as last aforesaid, then and in such case H. Hildesheim will, upon receiving nine calendar months' previous notice from D. Hildesheim to repay the said principal sum on the 31st December, 1886, pay the same accordingly, and, failing such notice, H. Hildesheim will pay the said sum on such subsequent 31st day of December as may be appointed by D. Hildesheim for payment thereof by any notice as aforesaid, given nine calendar months before such 31st day of December.

"(4.) H. Hildesheim shall, upon his giving six calendar months' previous notice of his intention so to do, be at liberty to pay off the said principal sum of 20,000*l.* on the 31st December, 1886, or on any subsequent 31st December, but D. Hildesheim shall not be compelled to receive payment of the said sum of 20,000*l.* previously to the 31st December, 1886. The said fixed and additional interest shall be payable and paid up to the actual repayment of the said principal sum."

"(10.) Nothing herein contained shall be deemed or construed to create a partnership between the parties hereto."

In the latter part of the year 1885, some discussion took place between the brothers as to the continuance of the loan, in the course of which the bankrupt offered to pay off the loan, and said that he should be able to do so because he was about to receive a sum of 19,850*l.* from an insurance company on December 31, 1885. The appellant said that he did not wish the loan to be paid off, though he wished an alteration in the terms, and ultimately the following agreement in writing, dated January 25, 1886, was entered into:—

"(1.) D. Hildesheim agrees as from the 1st of January, 1886, to continue his existing loan to H. Hildesheim of the sum of 20,000*l.* for one year upon the terms herein contained.

"(2.) H. Hildesheim agrees in consideration of the premises to pay to D. Hildesheim interest on the said sum of 20,000*l.* at the rate of 10 per cent. per annum, by equal half-yearly payments on the 30th June and the 31st December in the said year, and to repay the said sum of 20,000*l.* on the latter date, provided either party has given six months' notice in writing to the other of the termination of this agreement at the expiration of such year, but, if no such notice shall be given, this agreement is to remain in force for another year."

The loan was in fact continued until January 9, 1893, when a receiving order was made against H. Hildesheim, and he was afterwards adjudged a bankrupt. The appellant tendered the above proof for principal and interest.

Finlay, Q.C., and *Yate Lee*, for the creditor.

Sir H. Davey, Q.C., and *E. A. Parry*, for the trustee.

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IN RE HILDESHEIM. EX PARTE THE TRUSTEE.

June 21. VAUGHAN WILLIAMS, J. I am of opinion that the judgment of the learned county court judge must be reversed. I have arrived at this conclusion with considerable hesitation, because the question to be decided is one of fact rather than of law. The question is, whether, at the date of the receiving order, David Hildesheim was a lender, to use the words of the statute, "of any such loan," that is, "a loan upon a contract in writing that the lender shall receive a rate of interest varying with the profits," or whether the effect of the agreement of 1886, taken in conjunction with the surrounding circumstances and considered fairly, was in substance a repayment of the money originally advanced and a relending of it. It was not, and cannot be, denied that, if such was the effect of the agreement, David Hildesheim was not thenceforward "the lender of any such loan" within the meaning of the Act.

According to the uncontradicted evidence of David, Hermann Hildesheim was in 1886 in a position to pay off the loan of 1880 in cash, and he actually offered to do so, and therefore the reason for which the Court of Appeal refused in *Ex parte Taylor* (1) to treat a new agreement as a repayment by the borrower and a relending of the money on fresh terms has no application. It will be seen if the judgments in that case, as well as those in *Ex parte Mills* (2), and *In re Stone* (3), are looked at, that in each case the Court held that the new agreement merely provided for the mode of payment of the old debt, and that the old debt continued, notwithstanding the alteration in the mode of its liquidation or in the rate of interest. But it seems to me that in the present case the original loan was in form and in substance entirely put an end to, and that the agreement of 1886 was an entirely new transaction—a separate lending on different terms from those of the original loan. Indeed it was hardly denied that this was so, if the allegations contained in David Hildesheim's affidavit were admissible in evidence. It was said that they were not admissible, because they contradicted the terms of the written instrument of 1886. It does not seem to me that the affidavit does in any way con-

(1) 12 Ch. D. 366. (2) Law Rep. 8 Ch. 569.
(3) 33 Ch. D. 541.

tradict that instrument, and if so, it is fairly admissible to shew that in substance and in fact there was a repayment of the old loan, and a relending of the money.

It is said that the expression in the agreement of 1886, "agrees to continue his existing loan," shews that the original loan was intended to continue. But, in my opinion, it is only meant that the lender shall continue to lend a sum of £20,000, that is, the same amount as that of the original loan, but on terms entirely outside Bovill's Act. The agreement of 1886 says that the existing loan shall be continued "upon the terms herein contained." It seems to me that those words exclude the terms of the agreement of 1880, and that, having regard to the evidence, the original loan was in substance repaid, although the form of repayment was not enacted between the parties.

Kay, L.J., in his judgment in *In re Stone* (1) said that it was held in *Ex parte Mills* (2), "that the time at which the advance was made must be looked at, and if that advance was made upon a contract under which the lender was to receive a share of the profits, that brings it within the provisions of the statute. The fact that the first agreement of September, 1882, was afterwards altered by another agreement in October, 1883, which may have been secret, and not known to the world, cannot affect creditors who claim under a deed of trust subsequently executed." But in *Ex parte Mills* (2) there was no pretence for saying that the original loan had been paid off. The only alteration made in that case in the relation of the lender and borrower was, that the lender accepted from the borrower bills in repayment of the original loan, on which interest at a fixed rate was substituted for interest varying with the profits. I do not understand Kay, L.J.'s, observation about the second agreement being secret, and, therefore, not affecting creditors. I cannot suppose that he means that, in a case in which the original loan had been in fact paid off, and thereupon a new loan had been made on terms outside Bovill's Act, the creditors would have a right to say that the old loan was continued, merely because the repayment was made in secret.

(1) 33 Ch. D. at p. 544. (2) Law Rep. 8 Ch. 569.

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On the whole, I think that the decision of the learned county court judge was not justified by the evidence before him.

My brother Bruce has authorized me to say that he has read my judgment, and that he concurs in it.

Appeal allowed.

Leave was given to appeal to the Court of Appeal.

Sir H. Davey, Q.C., and *E. A. Parry*, for the trustee. Regard must be had to the terms upon which the loan was originally made, and those terms were such as to bring the transaction within s. 5 of Bovill's Act (28 & 29 Vict. c. 86), or of s. 3 of the Partnership Act, 1890 (53 & 54 Vict. c. 39). (1) The original

(1) By Bovill's Act, s. 1: "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

By s. 5: "In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, ... until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

By the Partnership Act, 1890, which came into operation on January 1, 1891, Bovill's Act was wholly repealed, and the following provisions were substituted for ss. 1 and 5. By s. 2, sub-s. 3 (*d*) "The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto."

Sect. 3: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section . . . . being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan . . . . until the claims of the other creditors of the borrower . . . . for valuable consideration in money or money's worth have been satisfied."

advance of £20,000 was not repaid in 1886; indeed the lender declined the offer of repayment. And the new agreement expressly provided that the lender should "continue his existing loan." It is true that the terms were altered, and a fixed rate of interest was substituted for a share of the profits, but that was not sufficient to take the case out of the Act: *Ex parte Mills* (1); *Ex parte Taylor* (2); *In re Stone.* (3) There was nothing which amounted to an unconditional repayment of the loan, and a readvance of the money upon new terms. The lender, therefore, cannot prove in the bankruptcy until all the other creditors have been paid in full.

Finlay, Q.C., and *Yate Lee*, for the creditor. The authority of the cases cited is not disputed. But the question is, whether the loan was not in substance repaid, and a new advance of the same amount made upon new terms such as to exclude the operation of s. 5 of Bovill's Act. That is really the substance of what took place. The borrower had the means of repaying the loan, and he offered to do so. It was not necessary that the money should be actually handed over to the lender, and then handed back by him: *Credit Co.* v. *Pott.* (4) The fact that an offer to repay the loan was made, and that the borrower was in a position to repay it, distinguishes the present case from those which are relied on. There was in substance a repayment of the money, and a relending of it upon new terms to which s. 5 does not apply. The proof ought, therefore, to stand.

LORD ESHER, M.R. In my opinion we cannot depart from the construction which has been put upon the Act by previous decisions.

The question, no doubt, is one of fact. In 1881 the respondent lent his brother (the bankrupt) 20,000*l.*, and there has never from that hour to this been any other advance of 20,000*l.* The money was advanced upon terms which brought the transaction within s. 5 of Bovill's Act. That is admitted.

It has been held by this Court, first, and afterwards by Kay, L.J. (when he was Kay, J.), in obedience to the decision of this

(1) Law Rep. 8 Ch. 569.
(2) 12 Ch. D. 366.
(3) 33 Ch. D. 541.
(4) 6 Q. B. D. 295.

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Court, that the question is, What was the state of things when the money was advanced? And, if there has been only one advance, it signifies not how often the terms of the loan have been altered; if from the beginning to the end there has been but that one advance, you are to look at the time when the advance was made, and if at that time it was within Bovill's Act, it remains within the Act. That is the interpretation which has been given to the statute. If, therefore, in the present case, there was only the original advance which was within Bovill's Act, it signifies not whether the terms of the loan have been altered.

Now, what has happened since? To my mind the result of the evidence is clear. The respondent found that he was within the meshes of Bovill's Act, and he endeavoured to get out of them. He was probably advised that his brother might become bankrupt, and that in that case he would be postponed to the other creditors, and that he had better try to get out of Bovill's Act. He tried to do so. That was perfectly honest, and the only question is, whether he has succeeded in getting out of the Act. What did he do? He spoke to his brother about it, and his brother said, "I have a large sum of money coming to me at the end of December, and with that money I can pay you, and I shall be ready to do so." But the respondent said, "No, I do not want you to pay me. I shall not insist upon your paying me. I will continue the loan to you; but we must alter the terms so that I shall no longer take a part of the profits by way of interest. I will take a fixed 10 per cent. interest, and then I shall be out of Bovill's Act." That was a very fair arrangement; but the question is, whether it was successful in escaping from the Act. The loan was not paid off. The respondent did not want to be paid; he did not ask his brother to pay him; but, on the contrary, he said, "I will continue my advance to you." And in the new agreement (it may be said that this is not what was intended, but the truth is the respondent did not see the effect of what he was doing) it is said that he agrees "to continue his existing loan" upon new terms. There was, therefore, but one advance, and it was continued so as to be the same advance, but the terms were altered, and so, even if it became a new loan, still there was but one advance.

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Is, then, the transaction within Bovill's Act? In my opinion it is. The cases which have been cited have decided that, so long as the one advance continues, it is within Bovill's Act.

It is said that something took place the effect of which was that the original advance was gone, and a new advance was made. That was not so in fact. There was but one sum of 20,000*l.*, and the respondent had, so far as we can see, no other money. He could not have left the loan of 20,000*l.*, and have given the bankrupt another 20,000*l.*, and he did not do so. It was the same 20,000*l.* The truth is, that if, after Bovill's Act, and after the decisions which have construed it, a person finds himself within its meshes, he must, if he wants to get out of it, be very careful to have the money repaid to him without any understanding or agreement. He must be absolutely free; the money must be actually paid to him and the transaction absolutely closed, and then, if he afterwards of his own will or upon request enters into an absolutely new transaction, the first one being closed, he may get out of Bovill's Act. Unless he becomes absolutely free—free not only from contract, but also from understanding—he cannot get out of Bovill's Act. I will go so far as to say that, if the person who had obtained the first advance were by arrangement with the lender to bring the money and put it on the table and push it across to him, but upon the understanding between them that, the moment he had done so, the lender should push it back to him upon new terms, that would not be a new advance, it would still be the old advance. The transaction would be what Mr. Finlay accurately called a mere scenic thing, a mere play. There would be but one advance. But the present case does not even come up to that. There was no money produced. The bankrupt at the moment when the second agreement was made had not the money, and, if he had, he might have spent every shilling of it without doing anything dishonest to his brother. He had told his brother, "I am about to be paid a sum of money by an insurance company, and I shall be ready to pay you off"; and the brother had said, "No, I do not want you to pay it to me." It would have been perfectly honest for him to spend the money

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in any other way he pleased, and, nevertheless, this new arrangement as to the old loan would remain.

Under these circumstances it seems to me that this is a clear case. There was only one advance, and, according to the decisions, we must look only at the moment when the advance was made, and at that moment it was clearly within Bovill's Act. We must agree with the decision of the county court judge, and must disagree with that of the Divisional Court. The appeal must be allowed.

KAY, L.J. Bowen, L.J., has asked me to say that he concurs. I will add a very few words out of respect for the learned judges from whom we are differing.

Bovill's Act was passed for this purpose. There was before the Act a difficulty in lending money to a trader, upon the terms that the lender should receive by way of interest a share of the profits of the business, without the lender's incurring the danger of becoming a partner in the business with the person who was carrying it on. One result of his being a partner would be, that, if he lent money to his co-partner, he would in the event of bankruptcy be postponed to all the outside creditors of the business. But the Act provides that an advance of money by way of loan to a trader, upon the terms that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits, of the business, shall not of itself constitute the lender a partner; but there is added this condition, that the lender shall, in the event of the bankruptcy of the trader, be postponed to the other creditors of the business, just as if he had been a partner. He is not to be a partner, but he is to be under that particular disability in the event of bankruptcy.

I confess it struck me at first, not having in my mind *Ex parte Mills* (1), and the other cases which have been decided upon the Act, that, when the reason for that disability was completely removed, as it was by the second agreement in the present case, it would be reasonable to hold that the case was outside Bovill's Act.

(1) Law Rep. 8 Ch. 569.

However, it was most distinctly decided by the Court of Appeal in *Ex parte Mills* (1), which was followed by myself in *In re Stone* (2), and by this Court in *Ex parte Taylor* (3), that such an alteration of the terms of the original advance, unless the transaction amounts to a repayment of that advance and the making of a new loan, does not take the case out of Bovill's Act. And I confess that upon reflection I can see a very strong reason for so holding, because if, as appears to have happened in the present case, the lender sees that the borrower is about to extend his business in a way which may involve considerably greater risks than did the business which he was carrying on when the advance was originally made, then, if by merely altering the terms of the advance—if the lender, by giving up his share of the profits and taking a fixed rate of interest instead, could secure that he should not be postponed to the other creditors in the event of the bankruptcy of the borrower—if that were held to be the true meaning and operation of the Act, one can see that it would very often happen that, when a loan of this kind had been made and the borrower was getting into difficulties, some such new arrangement would be made for the very purpose of escaping from the effect of the Act.

Now, it has been most distinctly held that, unless the subsequent transaction amounts to a bonâ fide repayment of the original advance, and the making of a new advance upon terms which take the case out of Bovill's Act, the Act continues to apply, and the loan must still be considered as subject to the provisions of the Act, notwithstanding the change which has been made in the terms. The real question, therefore, in the present case is, whether we can hold that the transaction which took place in 1886 amounted to a repayment of the original advance, and the making of a new advance on different terms. Now, the very first thing which strikes one is, that by the second agreement the lender agrees as from January 1, 1886, "to continue his existing loan" to the borrower of the sum of £20,000 for one year "upon the terms herein contained." I will assume, and indeed I think

(1) Law Rep. 8 Ch. 569. (2) 33 Ch. D. 541.
(3) 12 Ch. D. 366.

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that is the true meaning, that the terms upon which the loan is to be "continued" are in substitution in all respects for the terms of the original agreement, and that the terms of the original agreement are done away with; still the question is, does that make the transaction a new advance? According to the very language which the parties have chosen for themselves, it is not a new advance, but it is a "continuation" of the existing loan of £20,000.

I think that the affidavit of the lender which has been read to us is to a great extent an attempt to deal with the construction of the agreement. The only material part of it is that in which he says that, before the agreement was come to, his brother (the borrower) told him that he was about to receive a sum of nearly £20,000, and that he would then be ready to repay the loan. That is, no doubt, a material circumstance—a circumstance which we have a right to regard in construing the new agreement. But the lender's answer was in effect that he would not take the money, that he did not want it back, but was willing that the loan should continue, though upon other terms. No doubt (as has been said by the Master of the Rolls) the lender had been advised of the danger in which he would be, in case his brother's contemplated extension of business should turn out disastrously, as it unfortunately has done, and he entered into the new agreement in order to escape from the effect of Bovill's Act. I do not think that the attempt has been effectual. I do not think there was a new advance, and it seems to me that the Act requires that there should be a new advance by way of loan, and not merely new terms upon which the original advance is to be continued. The decision of the Divisional Court must, therefore, be reversed.

Appeal allowed.

Solicitors: *Grundy, Kershaw & Co.; Hollams, Sons, Coward, & Hawksley.*

W. L. C.

[IN THE COURT OF APPEAL.]

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June 2; *Aug.* 11.

IN RE NORMAN. EX PARTE BOARD OF TRADE.

Bankruptcy—Deed of Arrangement—Board of Trade—Accounts of Trustee—Retrospective Effect of Statute—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 25—*Deeds of Arrangement Rules*, 1890, *rr.* 7, 16—*Appendix to Rules*, *Forms* 2, 3, 6.

By the Bankruptcy Act, 1890, s. 25, sub-s. 2 (*b*): "Every trustee under any deed of arrangement, as defined by s. 4 of the Deeds of Arrangement Act, 1887, shall, within thirty days of the 1st of January in each year, transmit to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee, in the prescribed form, and verified in the prescribed manner." The Act came into operation on January 1, 1891:—

Held, that this enactment either does not apply at all to deeds of arrangement executed before January 1, 1891, or that, if it does apply to such deeds, it only requires the trustee to furnish accounts of receipts and payments which took place subsequently to January 1, 1891.

APPEAL by the Board of Trade against the refusal of Vaughan Williams, J., to direct the trustee under a deed of arrangement with creditors, executed by one Norman on October 25, 1888, to comply with an order of the Board, dated April 11, 1892, requiring the trustee to transmit to the Board an account of his receipts and payments, as such trustee, from October 24, 1888, to December 31, 1891.

The trustee objected to comply with the order, on the ground that s. 25 of the Bankruptcy Act, 1890, under which the order purported to be made, did not apply to deeds executed before January 1, 1891, the day on which the Act came into operation.

Vaughan Williams, J., held that the Act applied to deeds executed before that date, but that the trustee could not be compelled to furnish accounts for the period which had elapsed before the Act came into operation. And, on the undertaking of the trustee to furnish an account for the year 1891, the learned judge refused the application of the Board.

The Board appealed.

Muir Mackenzie, (*Sir J. Rigby*, *S.G.*, with him), for the Board of Trade. Though the learned judge held, contrary to the

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contention of the trustee, that s. 25 of the Act of 1890 (1) applies to deeds registered before January 1, 1891, yet he held that the

(1) By the Bankruptcy Act, 1883, s. 131: "The registrars and other officers of the Courts acting in bankruptcy shall make to the Board of Trade such returns of the business of their respective Courts and offices, at such times and in such manner and form as may be prescribed, and from such returns the Board of Trade shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches.

"The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act, to be prepared and laid before both Houses of Parliament."

By the Bankruptcy Act, 1890, s. 25: "(1.) The general annual report which, by s. 131 of the principal Act, the Board of Trade is required to cause to be prepared and laid before Parliament, shall include a report of proceedings under the Deeds of Arrangement Act, 1887.

"(2.) For the purposes of such report—

"(*a*) The registrar of bills of sale shall make to the Board of Trade such returns of the registration of deeds of arrangement, at such times, and in such manner and form, as may be prescribed;

"(*b*) Every trustee under any deed of arrangement, as defined by s. 4 of the Deeds of Arrangement Act, 1887, shall, within thirty days of the 1st of January in each year, transmit to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee, in the prescribed form, and verified in the prescribed manner. If any trustee fails to transmit such account, the judge of the High Court to whom bankruptcy business has been assigned, may, for the purpose of enforcing the provisions of this section, exercise, on the application of the Board of Trade in the matter, all the powers conferred on the Court by sub-s. 5 of s. 102 of the principal Act in cases of bankruptcy;

"The term 'trustee' in this section shall include any person appointed to distribute a composition or to act in any fiduciary capacity under any deed of arrangement."

"(3.) The accounts transmitted to the Board of Trade in pursuance of this section shall be open to inspection by any creditor on payment of the prescribed fee."

By the Deeds of Arrangement Rules, 1890, dated November 26, 1890, r. 7: "The account of receipts and payments to be transmitted to the Board of Trade by every trustee under any deed of arrangement, as defined by s. 4 of the Deeds of Arrangement Act, 1887, shall be in the Form No. 2 in the Appendix, with such variations as circumstances may require."

Rule 14: "Where it appears to the Board of Trade that the account transmitted by a trustee under a deed of arrangement is incomplete, or requires amendment or explanation, the Board of Trade may require such account to be completed or amended, or require the trustee to furnish explanations with reference to any of the entries appearing therein; and

Board of Trade had no power to require the trustee to deliver accounts of a date prior to January 1, 1891.

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any such requirement by the Board of Trade may be enforced in the same manner as the transmission of accounts under s. 25 of the Bankruptcy Act, 1890."

Rule 15: "Where a trustee has not since the date of his becoming trustee, or since the last time that his accounts have been transmitted, as the case may be, received or paid any money on account of the debtor's estate, he shall, at the period when he is required to transmit his accounts to the Board of Trade, forward to the Board of Trade an affidavit of no receipts or payments."

Rule 16: "Where a trustee has realized all the property included in the deed of arrangement, or so much thereof as can probably be realized, and has distributed a final dividend, or final instalment of composition, or in any other case where the trusts of the deed or obligations of the trustee have been completely fulfilled, the trustee shall transmit with his yearly account an affidavit in the form No. 6 in the Appendix, and no further accounts need thereafter be transmitted by him."

Rule 17: "In any particular case in which it shall appear to the Board of Trade that an account of receipts and payments in the form and containing the particulars in the Deeds of Arrangement Rules, 1890, may for special reasons be dispensed with, the Board of Trade may permit the trustee to transmit, instead of accounts in the form therein specified, such a summary of his accounts or modified statement of accounts as to the Board of Trade shall appear sufficient."

Rule 18: "Where a trustee under a deed of arrangement satisfies the Board of Trade by an affidavit or otherwise that the trusts of the deed, or the obligations of the trustee thereunder, were completely fulfilled or discharged prior to the 1st January, 1891, the accounts prescribed by the Deeds of Arrangement Rules, 1890, and these rules, need not be transmitted."

[The above rules 17 and 18 were issued in May, 1891, and are to be read and construed as part of the Rules of 1890.]

The Form No. 2 in the Appendix to the rules is headed: "In the Matter of a Deed of Arrangement Between —— and his creditors. Dated the —— day of ——, 189–. Registered the —— day of ——, 189–."

The Form No. 3, of "Affidavit verifying Trustee's Account," is headed, "In the matter of a deed of arrangement dated the —— day of ——, 189–, and registered the —— day of ——, 189–, between A. B. as debtor and G. H. as trustee." It contains the following passage: "The account hereunto annexed marked B contains a full and true account of my receipts and payments on account of the estate comprised in the said deed from the —— day of ——, 189–, to the —— day of ——, 189–, inclusive."

The Form No. 6, "Affidavit by Trustee with Final Account," is headed, "In the matter of a deed of arrangement dated the —— day of ——, 189–, and registered the —— day of ——, 189–, between —— and —— as trustee."

It contains the following passage: "The account hereunto annexed (together with the previous accounts rendered by me) contain a full and

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The account is certified by the trustee to be a complete account. An account which commences at an arbitrary date in a continuous transaction is really no account at all. If the trustee had delivered an account in the year 1891, and he was afterwards called upon to deliver an account in 1892, he would not then have to deliver an account from the beginning. It would be sufficient to start with the balance of the previous account. The object of the Act was to apply to deeds of arrangement the system which applies to proceedings in bankruptcy. An account starting in the middle of the trusteeship would give no information. The rules might have required each account delivered by the trustee to commence ab ovo. In point of fact, the rules do not require so much. But, unless the first account commences from the commencement of the trusteeship, the trustee cannot make the affidavit Form No. 6 which is required to be made on passing his final account—that the final account, together with the previous accounts, contain a full and true account of all his receipts and payments. The successive accounts form a continuous narrative. The first account delivered would be useless if it did not start from the beginning, unless previous years had been dealt with in previous accounts.

The Trustee in person. The Act has no application to a deed executed before it came into operation. It may be admitted that there would be no practical difficulty in furnishing the account; but there is an objection on principle to the retrospective interference of the Board of Trade.

Muir Mackenzie, in reply. If the decision of Vaughan Williams, J., is right, the Board will have to alter the form of the order which they send to trustees of deeds of arrangement. The Board require the accounts in order to complete their annual report to Parliament. They cannot otherwise state the amount of the assets and liabilities under a deed.

Cur. adv. vult.

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true account of all my receipts and payments on account of the estate referred to in the above-mentioned deed, and of any receipts and payments on my behalf as such trustee."

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Aug. 11. LORD ESHER, M.R. An Act of Parliament cannot be held to be retrospective in its operation unless there is something which compels us to hold that it is. The Board of Trade ask that the trustee may be ordered to transmit to them accounts with regard to transactions which took place before the Act of 1890 came into operation. The trustee cannot be compelled to do this unless the Act is made retrospective. It was urged that we ought to hold the Act to be retrospective by reason of the rules and forms which have been made under it, and which have a statutory force; and it is said that they shew that the trustee must go back in his accounts to matters which happened before the Act came into operation. But, when we look at the forms, we see that they are in express terms headed so as to relate to transactions taking place after the coming into operation of the Act; and, therefore, they supply no reason why we should depart from the ordinary rule that an Act is not retrospective.

Under these circumstances, therefore, I think that items of accounts before the Act came into operation need not be given by the trustee. I am the more glad to come to this conclusion, because I believe this requirement of the Board of Trade to be a mere departmental requirement of that which would be of no use whatever; and in that view of the matter I am happy to say that I have the entire concurrence of the learned judge in bankruptcy who is most conversant with these matters, and with whom I have had some consultation as to the importance of the matter. I think it is a mere departmental requirement of a technical character, which would be of no use to any one, and would involve large expense. Therefore, for the reasons which I have given, I think it ought not to be enforced.

BOWEN, L.J. I am of the same opinion. By virtue of s. 25 of the Bankruptcy Act, 1890, the trustee under any deed of arrangement "shall in each year transmit to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee, in the prescribed form, and verified in the prescribed manner."

The first point taken was, that the section does not apply at all retrospectively; and it was said, secondly, that, if it is

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retrospective, the account required need only be an account for the current year, and that it is not necessary that the account should include any items which had found a place in the accounts of previous years. It is to be observed that the account is to be rendered "in the prescribed form, and verified in the prescribed manner." What does that mean? It means apparently that we must look for the "prescribed form" and the "prescribed manner" of verification to the Deeds of Arrangement Rules which have been made under the Act of 1890.

Now, when we look at those rules, we find that the account of receipts and payments is to be "in the Form No. 2 in the Appendix, with such variations as circumstances may require," and it is "to be verified by an affidavit in the Form No. 3 in the Appendix"; and, finally, by rule 16, "when the trustee has realized all the property included in the deed, or where the trusts of the deed have been completely fulfilled, the trustee shall transmit with his yearly account an affidavit in the Form No. 6 in the Appendix, and no further accounts need thereafter be transmitted by him."

Upon this rule 16 a further argument was founded on behalf of the Board of Trade. It was urged that, if the affidavit is to follow the form prescribed by rule 16, and shewn by Form No. 6, the trustee must swear that the account annexed to his final affidavit (together with the previous accounts rendered by him) "contain a full and true account of all my receipts and payments on account of the estate." It was said that by implication the rule and the form together shew that this affidavit never could be truly made in reference to a deed of arrangement dated prior to the coming into operation of the Act of 1890, unless with his first account rendered after January 1, 1891, the trustee included an account of the previous year or years. That is shortly the argument of the Board of Trade upon the rules and forms which have been made for the working out of s. 25, sub-s. 2 (*b*), of the Act of 1890, and by those rules and forms that portion of their argument must stand or fall. It is a portion of the argument by which they seek to shew that s. 25, sub-s. 2 (*b*), has a retrospective operation. When I turn to the forms in question, I find that every one of them is so drawn as not to be applicable to any

deed of arrangement which bears date in the years from 1880 to 1890 as distinguished from the years after 1890. Form 2 is headed, "In the Matter of a Deed of Arrangement, dated the —— day of ——, 189—," leaving to be filled up only the last figure out of the four. Form 3 is exactly the same, and so is Form 6; and this shews that the forms were not intended to apply to any deeds of arrangement which belonged to the years between 1880 and 1890, and did not fall into the period after 1890. If you read the form otherwise, you have to alter the figure which is given in it.

This shews that those who framed the rules did not purport or pretend to prescribe a "form" of account, or a "manner" of affidavit in respect of deeds which belonged to the 1880 years, but that they only prescribed the "form" and the "manner" in the case of deeds which belonged to the 1890 years. The final figure to be filled in after the figures "189" was necessarily left blank, because as the Act came into operation on January 1, 1891, it was necessary to have a form which could be moulded so as to apply to deeds of arrangement which might be entered into in 1892, 1893, 1894, or 1895, and so on. The result is, that the framers of the rules themselves have not taken the view that s. 25 was, so far as they were concerned, to be applied retrospectively, and they have not prescribed any "form" or "manner" in which it is applied retrospectively; and, as the trustee is only bound to send in his accounts "in the form and to verify them in the manner prescribed," it follows that, even if s. 25 is retrospective, this is a casus omissus, and there is no "prescribed form or manner."

This may appear highly technical; but there is a great deal in it which is not technical, as will be seen by a moment's consideration. To compel the trustee under a deed of arrangement dated, for instance, in 1887, to send in all his accounts for the period between 1887 and 1891, might be a most burdensome and laborious requirement; it might be most expensive, and, moreover, a useless thing, and it by no means follows that those who framed the rules would have prescribed the same "form" for the account or the same "manner" for the affidavit, without adding some alleviations in the case of back accounts, the

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compilation of which would otherwise be onerous and expensive. We cannot assume that those who framed the rules would have made a rule in this form, intended to apply to deeds of arrangement executed prior to 1891, without also providing some shield or shelter for the trustee to prevent his being hampered by the Board of Trade in a manner which would be unjust and oppressive. On these grounds it seems clear to me that the argument of the Board of Trade, which, as I have already said, must stand or fall upon their being able to shew that the trustee's accounts have not been rendered in the "prescribed form," or verified in the "prescribed manner," fails, because in the present case no form or manner is prescribed by the rules or forms.

KAY, L.J., read a judgment, in which (after stating the provisions of the Act and the rules, and referring particularly to the Form No. 6) he continued:—It was argued that this form shews that the trustee is bound to account for all his receipts and payments since he became trustee at some time before transmitting his final account.

I was at first much impressed by this argument. Bowen, L.J., however, has pointed out that both the form of account and the form of affidavit appended to the rules relate in terms to accounts under a deed made after the coming into operation of the Act. The date given in both is "189–," i.e., 1890 or later. This makes it plain that the framers of the rules did not suppose that the statute applied in this part of it to deeds of arrangement already in existence.

If it be legitimate to refer, as was done in the argument, to the rules, as throwing light upon the question whether this part of the statute is retrospective, the result of doing so is to shew that the accounts to be furnished under s. 25, sub-s. (*b*), are only accounts under deeds of arrangement made after the Act of 1890 came into operation.

The result is, that the appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitor: *Solicitor to Board of Trade.*

W. L. C.

IN RE VANSITTART. EX PARTE BROWN. 1893 *Feb.* 9.

Bankruptcy—Voluntary Settlement—Gift of Jewellery—Purchaser for Value and in Good Faith from Beneficiary—Notice—Bankruptcy Act, 1883, s. 47.

Although s. 47 of the Bankruptcy Act, 1883, which avoids a voluntary settlement of property if the settlor becomes bankrupt within two years after the date of the settlement, contains no proviso for the protection of a purchaser in good faith and for valuable consideration, yet the title of such a purchaser from a beneficiary under the settlement, and without notice of the settlement, will be upheld against the trustee in bankruptcy of the settlor.

APPLICATION by the trustee in bankruptcy for an order that the respondents, Messrs. Hirsch & Co., bankers, might deliver up to him certain jewellery which had been pledged with them by the bankrupt's wife as security for a debt due to them from the bankrupt.

It appeared that the bankrupt and his wife were married in February, 1881, and between December, 1889, and September, 1891, the bankrupt had made presents of jewellery to his wife.

On October 17, 1891, the respondents, Messrs. Hirsch & Co., obtained judgment against the bankrupt for 524*l.* 7*s.* 3*d.*, being the amount due to them from him on Stock Exchange transactions, and on October 23, 1891, they served him with a bankruptcy notice. On October 26 he promised the respondents to get his wife to deposit her diamonds, of the value of 1000*l.*, with them as security for the judgment debt. This was done on October 29, and the terms of the deposit were contained in the following letter from Mrs. Vansittart to the respondents: "I send you herewith my diamonds, which I authorize you to hold as security for the repayment of my husband's debt to you. If the debt is not paid within a year you may sell the diamonds, should you think it necessary."

On December 8, 1891, a receiving order was made against the bankrupt on the petition of another creditor, and on January 9, 1892, he was adjudicated bankrupt.

In October, 1892, the Court, on the application of the trustee in bankruptcy, held that the gifts of jewellery by the bankrupt to his wife were a voluntary settlement under s. 47 of the

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Bankruptcy Act, 1883 (1), and under the circumstances void as against the trustee in bankruptcy. (The case is reported in [1893] 1 Q. B. 181.)

Witt, Q.C., and *Germaine*, for the trustee. This gift of jewellery having been held to be a voluntary settlement under s. 47 and void, the respondents are in no better position than Mrs. Vansittart, through whom they claim. It is submitted that the expression "void" in the section should bear the same construction that it does in s. 48 of the Act—that is, that the settlement is not made "voidable," but absolutely "void." There is no saving clause in s. 47 in favour of persons claiming to be purchasers from the donee under the settlement in good faith and for value: *Curtis* v. *Price* (2); *Ex parte Bell* (3); *In re Briggs & Spicer*. (4)

H. Reed, Q.C., and *Abrahams*, for the respondents. The settlement must be regarded rather as "voidable" than absolutely "void": *In re Holden* (5); and the respondents being purchasers from the donee of the settlement in good faith and for valuable consideration, the transaction may be treated as falling within the protection of ss. 48 or 49 of the Act. At any rate the transaction falls within the principle of the cases under the Statute 27 Eliz. c. 4, where settlements originally voidable have been validated by subsequent acts: *George* v. *Milbanke* (6); *Daubeny* v. *Cockburn* (7); *Morewood* v. *South Yorkshire Railway and River Dun Co.* (8); *Hance* v. *Harding* (9); *Halifax Joint Stock Banking Co.* v. *Gledhill*. (10)

Witt, Q.C., in reply.

(1) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47: "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith or for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy."

(2) 12 Ves. 103.
(3) 1 Gl. & J. 282.
(4) [1891] 2 Ch. 127.
(5) 20 Q. B. D. 43.
(6) 9 Ves. 190.
(7) 1 Mer. 626.
(8) 28 L. J. (Ex.) 114.
(9) 20 Q. B. D. 732.
(10) [1891] 1 Ch. 31.

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VAUGHAN WILLIAMS, J. The point I have to decide in this case arises upon the true construction of s. 47 of the Bankruptcy Act, 1883. The facts are, shortly, that the bankrupt made presents of jewellery to his wife within two years of his bankruptcy, and since his adjudication I have held these gifts to be a "settlement," and, as a "settlement," void by reason of the provisions of s. 47. But before the settlement was declared void, and before the bankruptcy or any proceedings relative to it occurred, the wife pledged a portion of the jewellery so settled on her with Messrs. Hirsch & Co., the respondents. The trustee in bankruptcy now says that, inasmuch as s. 47 enacts that the settlement is void, and not voidable, it follows that it is void altogether for all purposes, and that therefore the respondents cannot set up a title under this void conveyance as against the trustee in bankruptcy. Of course, no question could arise at all unless it appeared that the respondents were persons claiming in good faith and for valuable consideration, and in my opinion they are such persons. So far as the respondents are concerned I am of opinion that they took the jewellery as a pledge in good faith and for valuable consideration.

It has been suggested on the part of the respondents that I might decide that the transaction fell within the terms of s. 49, which provides for the protection of bonâ fide transactions without notice, and *Hance* v. *Harding* (1) was cited; but that case is no authority on the point. It only decided that a transaction, although it fell within s. 91 of the Act of 1869, the corresponding section to s. 47 of the present Act, might, nevertheless, if procured for valuable consideration given by a third person so as to be a dealing with that person, be a protected transaction within s. 94 of the Act of 1869, the corresponding section to s. 48 of the present Act; but in the present case the settlement was voluntary, and the respondents had no dealing with the settlor, and it was urged upon me on behalf of the trustee that I ought not to hold that the consideration given by the respondents to the beneficiaries under the settlement makes the settlement enure in favour of the respondents, because that would be to read into s. 47 the saving proviso which is expressed in s. 48, but not in s. 47.

(1) 20 Q. B. D. 732.

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It must, however, be remembered that there is a reason for the proviso in s. 48, because fraudulent preference is an act of bankruptcy, whereas a transaction under s. 47 is not an act of bankruptcy at all. Considering s. 47 by itself, there are various reasons for so construing it as to operate in favour of bonâ fide holders for value from those who claim as beneficiaries under the settlement. The section belongs to a class of legislation in favour of creditors, and, so far as the earlier Bankruptcy Acts are concerned, it has been over and over again held, that where valuable consideration has been given subsequent to the date of the settlement, such consideration enures to prevent the transaction being considered as a voluntary settlement so as injuriously to affect the position of persons who have given valuable consideration. Moreover, it must be remembered that s. 47 only comes into operation when bankruptcy supervenes. In fact, the settlement is only voidable on bankruptcy supervening, and it would seem to follow that, if the beneficiary for valuable consideration parts with the settled property before bankruptcy has supervened, the title of the transferee ought not to be avoided by subsequent bankruptcy. Again, the very fact that the beneficiary has parted with the settled property seems thenceforth to negative the permanency imported by the word "settlement." The history of this section cannot be forgotten. Its provisions are in substance the same that have appeared again and again in the earlier Bankruptcy Acts, and I do not think the section in any of the earlier Acts had any application so as to bind purchasers for value. Again, I think that if the section is considered as a whole, it will be seen that the legislature only intended to bind those who claim under the settlement; and that, notwithstanding the use of the word "void," the intention was that the section should only operate on those claiming under a voluntary settlement as donees, and should not bind those who have purchased for valuable consideration and in good faith from such donees. The chief difficulty I feel in arriving at this decision is caused by *In re Briggs & Spicer*. (1) I feel much impressed by that decision; but on the whole I have come to the conclusion that the question Stirling, J., had to decide there was different from the question I have to decide here. At any

(1) [1891] 2 Ch. 127.

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rate, the purchaser there had notice of the settlement, and I do not understand that upon the facts of the present case it can be shewn that the respondents had any notice of the settlement at all. For anything they knew to the contrary, the wife was dealing with her own jewellery, and her husband was cognizant of this fact. On the whole, therefore, I have persuaded myself, although the words of the section do present difficulties, that the claim by the trustee in this case does not prevail against the title acquired by the respondents from the donee under this settlement. The application of the trustee must be dismissed.

Solicitors for trustee: *A. & E. Bastard.*

Solicitors for respondents: *Michael Abrahams & Co.*

H. L. F.

IN RE BRALL. EX PARTE NORTON.

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April 21; *May* 19.

Bankruptcy—Voluntary Settlement of Leaseholds—Mortgage by Donee under Settlement—Bankruptcy of Settlor—Bonâ fide Purchaser for Value—Notice—The Bankruptcy Act, 1883, *s.* 47.

The expression "void" in s. 47 of the Bankruptcy Act, 1883—which enacts that voluntary settlements of property shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy—must be construed as meaning "voidable" and not absolutely void, and a bonâ fide purchaser for value from the donee under such a voluntary settlement has a good title against the trustee in bankruptcy even if he purchased with notice that the donee claimed under a voluntary settlement.

APPLICATION by the trustee in bankruptcy of L. & W. H. Brall, claiming that a certain indenture dated April 14, 1892, being an assignment of leaseholds, might be set aside on the ground that the deed was a voluntary settlement under s. 47 of the Bankruptcy Act, 1883. It appeared that the bankrupt L. Brall carried on business in co-partnership with his son W. H. Brall. On April 14, 1892, L. Brall by deed assigned a leasehold house, which was his separate property, to his daughter, Thirza Brall, the consideration for the assignment purporting to be natural love and affection.

On September 14, 1892, the partnership being in financial difficulties, Thirza Brall, on the persuasion of her brother, W. H. Brall,

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and without the knowledge of her father, L. Brall, deposited the lease and the assignment with the London and Westminster Bank as security for a loan of 400*l.*, then advanced by the bank on the joint promissory note of Thirza Brall and W. H. Brall, and the money was placed to the credit of the partnership account.

On October 19, 1892, a receiving order was made against L. Brall, and on November 8 he was adjudicated bankrupt; and his trustee in bankruptcy now applied for an order to set aside the assignment of April 14, 1892, as being a voluntary settlement and "void" under s. 47 of the Bankruptcy Act, 1883, and that the bank might be directed to deliver up to him the deeds in their possession.

Farwell, Q.C., and *Broomfield*, for the trustee. The deed of April, 1892, is clearly a voluntary settlement and without valuable consideration: *Price* v. *Jenkins* (1); *Ex parte Hillman.* (2) Such a settlement is "void" under s. 47 of the Act, and the bank cannot make title through or under the donee of the settlement, because they took with notice that the settlement was a voluntary one: *Patman* v. *Harland* (3); *In re Briggs & Spicer.* (4) That distinguishes this case from the recent decision in *In re Vansittart* (5), where the purchaser had no notice of the voluntary settlement.

H. Reed, Q.C., and *Muir Mackenzie*, for the bank. The word "void" in s. 47 means "voidable": *In re Holden* (6); *In re Vansittart.* (5) The legislature never intended that a donee under a voluntary settlement should not sell or give a good title until after the expiration of ten years from the date of the settlement. The subsequent valuable consideration given by the bank in good faith brings the case within the principle of the decisions under the statute 27 Eliz. c. 4. The doctrine is summed up in May on Voluntary Settlements, pp. 315, 329, where all the authorities are cited. *Hance* v. *Harding* (7) is to

(1) 5 Ch. D. 619.
(2) 10 Ch. D. 622.
(3) 17 Ch. D. 353.
(4) [1891] 2 Ch. 127.
(5) Ante, p. 377.
(6) 20 Q. B. D. 43.
(7) 20 Q. B. D. 732.

the same effect. Here the bankrupt's estate had the benefit of the money advanced by the bank.

Farwell, Q.C., in reply.

Cur. adv. vult.

May 19. VAUGHAN WILLIAMS, J. In this case, Mr. Brall, senior, settled on his daughter, Miss Thirza Brall, a leasehold house, in April, 1892. The consideration for the settlement purported to be natural love and affection. Mr. Brall carried on business in partnership with his son, Mr. W. H. Brall; but the leasehold house in question was the separate property of Mr. Brall, senior. In September, 1892, the partnership being in financial difficulties, Mr. Brall, junior, without the knowledge of his father, induced his sister to mortgage the leasehold house to secure a sum of money advanced to him on the joint promissory note of himself and his sister. The proceeds of this advance were carried to the partnership account; but it does not appear that Mr. Brall, senior, had any knowledge of this, although, as partner, he in fact took the benefit of the advance. Mr. Brall, senior, having become bankrupt, the trustee in his bankruptcy claims as against the respondent bank a declaration that he is entitled to the leasehold house. It is said on his behalf, that the settlement was a voluntary settlement without valuable consideration, and that, as such a settlement is void by s. 47 of the Bankruptcy Act, 1883, the bank cannot make title through or under the donee of the settlement. It is contended by the bank that the valuable consideration given by them relates back so as to prevent the settlement being without valuable consideration, as has been held with reference to conveyances under the 27th of Eliz. c. 4, and that especially is this so in a case where the estate of the settlor has had the benefit of the subsequent consideration given by the bank. It is contended, further, that the word "void" in this section means "voidable," and that, therefore, a purchaser for valuable consideration without notice prior to the avoidance of the settlement has a better title than the trustee, and that the fact that this section contains no proviso in favour of purchasers for value, like that contained in sub-s. 2 of s. 48, is accounted for by the fact that the necessity for such a proviso in

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s. 48 arises from the fact that a conveyance by way of fraudulent preference is an act of bankruptcy, whereas a voluntary settlement under s. 47 is not an act of bankruptcy.

On the whole, I have come to the conclusion that the word "void" in s. 47 of the Bankruptcy Act, 1883, means "voidable," and that, consequently, any one who claims, under a settlement affected by this section, as a purchaser for valuable consideration without notice, has a good title as against the trustee in bankruptcy. It is quite plain that the word "void" may mean "voidable," and there are several reasons why it should receive that construction in this Act. The test, to my mind, is whether the object of public policy in view in this section requires the strict construction. Now, it is to be observed that the object of this section is one for which the legislature has made provision in a long series of bankruptcy statutes, and that in all the bankruptcy statutes prior to 1869 the wording of the section was such as to make the settlement voidable, and not void, because under these statutes the avoidance of a voluntary settlement was effected by an order in bankruptcy for the sale, by the trustee, of the subject-matter of the settlement, and neither the word "void" nor the word "voidable" was used. It may be said that the object of the alteration in the words of the section was to make such settlements "void," and not "voidable"; but I think that the object of the legislature has remained unchanged, and that the purpose of the alteration in the wording was merely convenience of drafting, and to make it clear that the title of the trustee could not be avoided by anything done between the date of the bankruptcy and the declaration of the trustee's title. It seems to me that the judgment in the case of *In re Holden* (1) in effect decides that a settlement declared void under s. 47 is not void ab initio, because in that case the Court decided that the trustees of a settlement, which became void on the bankruptcy of the settlor by reason of the provisions of s. 47, were entitled as against the trustee in bankruptcy to a lien on the trust property for expenses incurred in the performance of their duties as trustees—that is to say, in resisting an action that had been previously brought to set aside the settlement. For had the

(1) 20 Q. B. D. 43.

settlement been void ab initio it would never have had a legal existence, and the trustees could not have established a lien. I am further of opinion that the mere fact that the bank had notice—as I think they in fact had—that the mortgagors claimed under a voluntary settlement is not sufficient to prevent them claiming as purchasers for value in good faith. The bank had no notice of any fact avoiding the voluntary settlement. They had no notice that the settlor was insolvent; and the bankruptcy which brought the settlement within the operation of the section had not occurred at the time of the advance and mortgage. Moreover, the moment it is assumed that the settlement is not void ab initio, all those authorities apply which decide under the 27th of Eliz. c. 4, that a purchase for valuable consideration from a person making title under a voluntary conveyance relates back so as to prevent the original conveyance being a voluntary conveyance within the meaning of the Act; and, even if this were not so, I should have been inclined to hold that the fact that the settlor's estate got the benefit of the advance made by the bank was itself sufficient pro tanto to prevent the settlement in question being a voluntary settlement within the meaning of s. 47. I have only to add that in my opinion the argument on behalf of the trustee based upon the absence from s. 47 of any clause in favour of purchasers for value, like that appearing in s. 48, is fallacious. The necessity of the clause in s. 48 arises from the fact that fraudulent preference is an act of bankruptcy. The result will be this motion fails, and the trustee must pay the costs.

Solicitors for trustee: *Harris & Cheetham.*
Solicitors for respondents: *Ford, Lloyd & Co.*

H. L. F.

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Aug. 10.

In re THE BIRKDALE STEAM LAUNDRY AND CARPET BEATING COMPANY, LIMITED.

Company—Winding-up—Public Examination of Promoters—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Report of Official Receiver suggesting, but not expressly stating, Fraud in Promotion of the Company.*

An order for public examination under the Companies (Winding-up) Act, 1890, s. 8, sub-s. 3, may be made if the official receiver has made a further report under sub-s. 2 suggesting, though not stating expressly his opinion, that a fraud has been committed by some person in the promotion of the company.

In re Laxon & Co. ([1893] 1 Ch. 210) followed.

Appeal ex parte from the order of a county court judge refusing an application by the official receiver under s. 8 of the Companies (Winding-Up) Act, 1890 (1) of the Birkdale Steam Laundry and Carpet Beating Company for an order for the public examination of James Smith Windsor, the vendor to and manager and a director of the company, P. P. Jacques, an accountant, and Richard Bentinck, auctioneer and valuer, and

(1) By the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 8: "(1.) Where the Court has made an order for winding-up a company the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court:—

"(*a.*) As to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, and

"(*b.*) If the company has failed as to the causes of the failure, and

"(*c.*) Whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

"(2.) The official receiver may also, if he thinks fit, make a further report or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

"(3.) The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to his conduct and dealings as director or officer of the company."

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G. R. Illingworth, all of whom had taken part in the promotion or formation of the company, on the ground that the official receiver's report did not state whether in his opinion any fraud had been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof.

It appeared that an order for winding up the company had been made, and that the official receiver had submitted a preliminary report, and had also made a further report.

Neither of the reports contained any express statement that a fraud had been committed by any person in the promotion or formation of the company, or by any director or officer of the company since its formation; but the further report contained (inter alia) the following statements:—

"A prospectus was issued to the public in which it was stated that Mr. Smith Windsor had carried on the laundry, which he had just sold to the company, for a period of twelve years with success, and by way of further inducement it was stated: 'The accountant of the Northern Estates Realization Company, Limited, has gone carefully through Mr. Windsor's books for the past five years, and certifies as follows: Capital invested, 2578*l.*; net profit, 1887, 373*l.*, 14½ per cent.; 1888, 379*l.*, 14¾ per cent.; 1889, 380*l.*, 14¾ per cent.; 1890, 415*l.*, 16 per cent.; six months to June 30, 1891, 274*l.*, 20¾ per cent. . . .' I have called upon Mr. Smith Windsor to produce to me the books from which these figures and results were obtained; but he has not done so, nor can I find that the company received any such books. Following upon these results I find that during the first twelve months the company was in existence the loss on the trading alone for that period amounted to the sum of 235*l.* 12*s.* 11*d.* . . . I am of opinion that further inquiry is desirable with regard to the formation, promotion, and failure of the company and the conduct of the business thereof; and that James Smith Windsor, the vendor and manager, P. P. Jacques, the accountant of the Northern Estates Realization Company, Limited, who, according to the prospectus, certified the amounts of capital invested by the vendor in the business, and the profits made in the business for the five years previous to the sale to the company, and

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Richard Bentinck who, along with G. R. Illingworth, of the Steam Laundry, Preston, made the valuation of the buildings and machinery, and G. R. Illingworth be examined before this honourable Court as to the matters herein."

Muir Mackenzie (*The Attorney General*, with him), for the official receiver. The county court judge thought that the effect of *In re Great Kruger Gold Mining Company* (1), and *In re Trust and Investment Corporation of South Africa* (2) was to decide that it was necessary for the official receiver to expressly state in his report that, in his opinion, some fraud had been committed, in order to give the Court jurisdiction to make the order for public examination under s. 8, sub-s. 3. What those cases really decide is, as is pointed out in *In re Laxon & Co.* (3), that it is sufficient if the facts mentioned in the report suggest fraud by some person or persons who have taken part in the promotion of the company, or who have been directors of the company, and if the report further states that the persons, whom it is proposed to examine, have taken part in the promotion, or have been directors of the company. The facts set out in this report clearly suggest fraud, and the order ought, therefore, to have been made.

CAVE, J. I think that this appeal should be allowed. The learned county court judge admittedly had before him the cases which were decided by the Court of Appeal (4); but he had not before him the case (5) in which my brother Vaughan Williams has placed an interpretation upon those decisions which appears to me to be warranted by the facts of the cases. Nor should we forget that this is a matter peculiarly within the knowledge of Vaughan Williams, J., and we should be very slow to come to any decision which conflicts in the slightest degree with any conclusion to which he has come, seeing that he has constant opportunity of considering what the Act of Parliament really means, and what is required for the purpose of carrying it out.

(1) [1892] 3 Ch. 307.
(2) [1892] 3 Ch. 332.
(3) [1893] 1 Ch. 210.
(4) *In re Great Kruger Gold Mining Company*, [1892] 3 Ch. 307; *In re Trust and Investment Corporation of South Africa*, [1892] 3 Ch. 332.
(5) *In re Laxon & Co.*, [1893] 1 Ch. 210.

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Cave, J.

The only question, as it seems to me, is whether the report suggests fraud. There is no doubt that it does. One of the allegations made in the prospectus was, that an accountant had examined the books of the vendor for some years past down to the middle of the year 1891, and that they had shewn large profits during the whole of those years; yet, the moment the business passes into the hands of the company, the result is a deficit. I am not surprised that the official receiver asked to see the books from which these results were brought out by the accountant. The vendor says that he cannot produce those books. They were in existence down to the middle of 1891; their contents, as vouched for by the accountant, formed a very prominent feature of the prospectus, and must have been instrumental in inducing people to come in and subscribe for shares; yet we are told that these books have disappeared. To my mind that alone is sufficient to suggest fraud on the part of the persons engaged in the promotion of the company. It is very desirable, under those circumstances, that further examination should be made. Nor do I see any hardship to the persons who are to be examined. They are entitled to their costs, if it turns out that there is no ground for any charges being made against them; and, although it might be better in all cases for the official receiver to state what it is that he says the facts suggest, and not simply to state them and leave the county court judge to draw a conclusion which may or may not be the conclusion which the official receiver has drawn, yet I think that, where that is not done, the county court judge still has authority under the Act to direct the examination; and, as we are told that in this case he would have directed the examination unless he had conceived that he was precluded from doing so by the judgments of the Court of Appeal (1), and, as those judgments as explained by Vaughan Williams, J., in *In re Laxon & Co.* (2) do not preclude him from directing the examination, I think that it is fit that this application should be acceded to, and that the persons in question should be directed to attend to be examined as requested.

(1) *In re Great Kruger Gold Mining Company*, [1892] 3 Ch. 307; *In re Trust and Investment Corporation of South Africa*, [1892] 3 Ch. 332.

(2) [1893] 1 Ch. 210.

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WRIGHT, J. I do not dissent, but I should not have been able, without assistance, to say that this conclusion was consistent with the judgments of the Court of Appeal. (1)

Appeal allowed.

Solicitor for appellant: *The Solicitor to the Board of Trade.*

A. P. P. K.

C. A.

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June 8; *Aug.* 10.

[IN THE COURT OF APPEAL.]

SOAR *v.* ASHWELL.

Limitations, Statute of—Trust, Breach of—Trustee, whether express or constructive—Solicitor to Trust, Receipt of Trust Fund by—Failure to Account.

A trust fund was held by trustees under a will in trust for two persons in equal shares for their respective lives and, after the death of each, in trust as to his share for his children. The fund was entrusted by the trustees to a solicitor employed by them as solicitor to the trust, and was by him invested, together with other moneys belonging to different trusts, on an equitable mortgage by deposit of title deeds, in his own name. The mortgage being paid off in January, 1879, the solicitor received the money so invested from the mortgagor, and distributed one moiety of it, the tenant for life having died, among his children, who by his death had become absolutely entitled to the same. He did not account for the other moiety to the trustees, but retained the same in his own hands.

On February 21, 1891, an action was brought by the surviving trustee under the will against the personal representative of the solicitor, who had died in November, 1879, claiming an account of the money so retained by him:—

Held, that he must be considered as having been in the position of an express trustee of such money, and therefore the lapse of time did not act as a bar to the action: by Lord Esher, M.R., and Bowen, L.J., because he received the money in a fiduciary relation and as trustee for his clients, the trustees; by Kay, L.J., because he, though a stranger to the trust, had assumed to act and had acted as a trustee, and had received the trust money under a breach of trust in which he concurred.

APPEAL of plaintiff from judgment of Day, J., at the trial before him without a jury.

The plaintiff was the surviving trustee, and also a beneficiary, under the will of Joseph Soar, deceased. The defendant was the executrix of one Ashwell, who had been employed by the trustees of the will as solicitor to the trust.

(1) *In re Great Kruger Gold Mining Company*, [1892] 3 Ch. 307; *In re Trust and Investment Corporation of South Africa*, [1892] 3 Ch. 332.

The action was brought for an account of a sum of £128, forming portion of the trust funds under the will, which had been received by Ashwell and not accounted for by him. The defence, inter alia, was that the claim was barred by lapse of time by analogy to the Statute of Limitations.

The facts appeared to be as follows:—

Under the trusts of the will a sum of 256*l.* was held by two trustees, in trust, as to one moiety for one John Soar for life and after his death for his children, and as to the other moiety for the plaintiff's father for life and after his death for his children. This sum had been invested by Ashwell, as solicitor to the trust, with other moneys belonging to different trusts, upon an equitable mortgage by deposit of title deeds, apparently in his own name. In 1877 one of the original trustees of the will died, and the plaintiff had been appointed trustee in his place. In January, 1879, the mortgage was paid off, and the sum of 256*l.* was received from the mortgagor by Ashwell. John Soar, the tenant for life of one moiety, dying in the same month, his children became absolutely entitled to such moiety, and it was accordingly distributed by Ashwell amongst them. The remaining moiety of 128*l.* never was paid over or accounted for to the trustees, but appeared to have been retained in his own hands by Ashwell, who in July, 1879, paid the half-yearly interest thereon to the tenant for life, the plaintiff's father. In November, 1879, Ashwell died. After his death the defendant, his widow and executrix, employed a clerk of his in winding up his professional business; and this clerk continued out of the assets of the business to pay the interest on the sum of 128*l.* every half-year to the plaintiff's father. In July, 1886, the plaintiff's father died, and thereupon the plaintiff, being his only child, became absolutely entitled to the money. Just before his death the clerk had given notice to him and the plaintiff that he had no more funds in hand to meet the interest, and referred them to the executrix. On February 21, 1891, the plaintiff, who was then the sole trustee under the will, his co-trustee being dead, commenced the action. The learned judge held that, Ashwell having been only a constructive trustee of the money in question, the action was barred by lapse of time by analogy to the Statute of Limitations.

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June 8. *W. H. Stevenson*, for the plaintiff. The action is not barred by time by analogy to the Statute of Limitations. These moneys having been received by the defendant's testator in a fiduciary capacity, with knowledge of the trusts to which they were subject, he was in the position of a trustee holding on express trusts, and therefore the Statute of Limitations does not apply: *Rolfe* v. *Gregory* (1); *Burdick* v. *Garrick* (2); *Banner* v. *Berridge* (3); *Gray* v. *Bateman* (4); *In re Bell, Lake* v. *Bell* (5); *Bridgman* v. *Gill.* (6)

Stanger, for the defendant. The analogy of the Statute of Limitations is applicable to cases of merely constructive trusts. In this case the defendant's testator was not a trustee by virtue of the instrument creating the trust. If a trustee, he only became so by construction of law.

Cur. adv. vult.

August 10. The following written judgments were delivered:—

LORD ESHER, M.R. In this case there was no such relation between the plaintiff and the deceased Ashwell as would entitle the plaintiff to maintain against Ashwell's executors an action at law in respect of the complaint he makes. The relief he demands is the subject solely of a suit or action in equity. The only way in which the plaintiff can validly state his demand in equity is to assert that Ashwell was a trustee of money now claimed by the plaintiff, which, if the trust were observed, must necessarily have come to the plaintiff, and that Ashwell committed a breach of trust by misappropriating the money which was in his hands, as a trustee of the trust, to his own use. If Ashwell did this thing, he must have done so before November, 1879, when he died. If there was the trust asserted by the plaintiff, the breach of it relied upon by the plaintiff must have happened—and it is the cause of the plaintiff's action, if any—before November, 1879. If the Statute of Limitations is applicable, it is fatal to the plaintiff's right to recover.

(1) 34 L. J. (Ch.) 274.
(2) Law Rep. 5 Ch. 233.
(3) 18 Ch. D. 254.
(4) 21 W. R. 137.
(5) 34 Ch. D. 462.
(6) 24 Beav. 302.

In order to determine whether a Statute of Limitations applies or not to a cause of action before the Court, the Court must first determine what is the cause of action relied on. The Court must do so in order to see whether it is an action of a class to which the statute in question applies. If the action is of a class within the statute, then the Court must determine whether the alleged breach, if any, occurred beyond the time of limitation. If the alleged breach, if it occurred at all, must have occurred beyond the time of limitation, the Court will not further inquire whether the breach did or did not in fact occur. The plaintiff's right to relief is barred.

The questions in this case therefore are, Was Ashwell a trustee of the money now claimed by the plaintiff within a meaning of the word "trustee" attributed to it in equity, and was he such a trustee as a Court of Equity will not allow to rely on the Statutes of Limitation? If there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of Equity, upon proof of such facts, will not allow him to vouch a Statute of Limitations against a breach of that trust. Such a trust is in equity called an express trust. If the only relation which it is proved the defendant or person charged bears to the matter is a contractual relation, he is not in the view of equity a trustee at all, but only a contractor; and equity leaves the contractual relation to be determined by the common or statute law. If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched.

There are cases not falling strictly within either of those thus enunciated, some of which have been treated by the Courts of Equity as within the class in respect of which a Statute of Limitations will not be allowed to be vouched, and some within the class in respect of which such a statute may be vouched. It must obviously be unnecessary on this occasion to state

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exhaustively all the different cases. It suffices to determine in which class is the present case.

It is not in the first enunciated case. There was an express trust created, but Ashwell was not at any time nominated as a trustee of that trust. He was the solicitor of the nominated trustees. As such solicitor he was entrusted by the nominated trustees to take and have in his hands the trust money, with a direction on their behalf to deal with it according to the terms of the trust. Assume that he misappropriated that money to his own use, and that that was all; the misappropriation would at once of itself make him the holder of the money in trust for the rightful owner, but, if that were all, only a trustee by construction of a constructive trust. But the questions in this case are whether Ashwell was not, in view of a Court of Equity, a trustee of the money before the alleged breach by misappropriation, and, if he was, under which class of trust he was with regard to limitations. The moment the money was in his hands, he was in a fiduciary relation to the nominated trustees; he was a fiduciary agent of theirs; he held the money in trust to deal with it for them as directed by them; he was a trustee for them. He was therefore a trustee of the money before he committed, if he did commit, the alleged breach of trust, and was in possession of and had control over the money before he committed, if at all, the alleged breach of trust.

The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his cestui que trusts for all such money or property without regard to lapse of time.

There is another recognised state of circumstances in which a person not nominated a trustee may be bound to liability as if he were a nominated trustee, namely, where he has knowingly

assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property. Such a person will be treated by a Court of Equity as if he were an express trustee of an express trust. The propositions thus enunciated seem to me to follow the judgments of Lord Hatherley and Giffard, L.J., in *Burdick* v. *Garrick* (1), and of Lord Selborne in *Barnes* v. *Addy*. (2) Where, in cases decided by judges as judges both of fact and law, you can collect the principle of law on which they have all assumed to act, it seems to me unnecessary to determine, though it is useful to consider, whether one would have applied that principle of law to the facts in the same way that any particular judge did in the case before him. I am of opinion that the present case is within the description of that which is treated as and is called in equity an express trust, and that the inquiry as to the alleged breach cannot be stopped by the Statute of Limitations.

I am clearly convinced by the evidence that Ashwell became on receipt of the money a trustee of it, and that, as he has not been shewn to have accounted for it, the defendant, his executrix, is liable as such for a breach of trust by him.

BOWEN, L.J. It appears to me to have been in the present case clearly shewn that the deceased husband of the defendant, who is the representative of his estate, was during his lifetime solicitor to the trustees, of whom the plaintiff is one besides being a beneficiary under the will; that, while acting as such solicitor, the deceased was entrusted with the custody of some of the trust moneys; and, lastly, that such trust moneys have never been repaid. The question therefore arises whether the claim of the plaintiff can be barred through lapse of time, by analogy to the Statute of Limitations. That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established. It was argued on behalf of the defendant that the present was the case of a constructive trust only, and the learned judge below appears so to have thought. On the decision of the question, whether this is the

(1) Law Rep. 5 Ch. 233. (2) Law Rep. 9 Ch. 244.

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case of an express or only of a constructive trust, the present appeal appears to hang.

An express trust can only arise between the cestui que trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the Court construes as involving him in the duties and responsibilities of a trustee, although but for such conduct and behaviour he would be a stranger to the trust. A constructive trust is therefore, as has been said, "a trust to be made out by circumstances." It is not unreasonable in the latter class of cases, where the liability of a stranger to the trust arises from his conduct and depends on the proof of his contemporary acts, that time should run in favour of the person to be charged. In such cases conflicts of evidence are possible or probable, and to deny to the person to be charged the shelter or benefit of a period of limitation would be obviously dangerous and unjust.

Although this general principle of justice has been authoritatively laid down in Courts of Equity, there has been some variety and inconsistency both in the language used about constructive trusts and in the line of demarcation that has been drawn between the cases of express and constructive trusts. First, the doctrine that time is no bar in the case of express trusts has been extended to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust: *Life Association of Scotland* v. *Siddal.* (1) This extension of the doctrine is based on the obvious view that a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends. Secondly, the rule as to limitations of time which has been laid down in reference to express trusts has also been thought appropriate to cases where a stranger participates in the fraud of a trustee: *Barnes* v. *Addy.* (2) Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property and dealt with it in a

(1) 3 D. F. & J. 58. (2) Law Rep. 9 Ch. 244.

manner inconsistent with trusts of which he was cognizant: *Lee* v. *Sankey*. (1) Fourthly, in some other cases, e.g., in *Bridgman* v. *Gill* (2), by Lord Romilly, and in *Wilson* v. *Moore* (3), by Lord Brougham, language has been employed in regard to the question of limitations of time in certain instances of constructive trust which can scarcely be reconciled with the language held in *Bonney* v. *Ridgard* (4); *Beckford* v. *Wade* (5); *Townshend* v. *Townshend* (6), and in other cases.

It is not necessary in the present appeal to discuss the somewhat fluctuating expressions that can be discovered in equity authorities on the subject of constructive trusts. One thing seems clear. It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: *Chalmer* v. *Bradley* (7); *Marquis of Cholmondeley* v. *Lord Clinton* (8); and this confidence or trust imposes on him the liability of an express or direct trustee.

The principle which clothes those who receive property in their fiduciary position with the liabilities of express or direct trustees was clearly laid down in *Burdick* v. *Garrick*. (9) "I do not say," says Hatherley, L.C., "that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply; but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application." "I do not hesitate to say," says Giffard, L.J., "that,

(1) Law Rep. 15 Eq. 204.
(2) 24 Beav. 302.
(3) 1 M. & K. 337.
(4) 1 Cox, 145.
(5) 17 Ves. 87.
(6) 1 Bro. C. C. 550.
(7) 1 Jac. & W. 51, 67.
(8) 2 Jac. & W. 1, 190.
(9) Law Rep. 5 Ch. 233.

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where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time." It is with reference to this language that Kay, J., said, in *Banner* v. *Berridge* (1): "That obviously enlarges the definition which Kindersley, V.C., gave, and points out that a man may be bound by an express trust where moneys, which in no sense belong to him, and in which he has no kind of interest, or goods, plate, or jewels, are placed in his hands by the real owner as depositee of them, and that without any writing or even expression in words that it was to be a trust. That would come, according to Lord Hatherley's dictum here, within the definition of express trust." This view was followed by Wickens, V.C., in *Gray* v. *Bateman* (2), and by Chitty, J., in *Lake* v. *Bell* (3), and has never since been impeached. In the case of *In re Sharpe* (4), recently before the Court of Appeal, the principle was applied to the case of directors of a company who had improperly parted with the assets of a company. "Where money," says Fry, L.J., "has found its way into the hands of a trustee or other person against whom this Court gives the same relief as against a trustee, there the trustee, or the *person in a fiduciary position*, cannot set up the Statute of Limitations or the analogy of the Statute of Limitations as an answer to the demand for money which was in his hands."

When we turn to the facts of the present appeal, it is plain that the case is one which obviously falls within this category or class. The deceased solicitor was the solicitor, not of the cestui que trusts, but of the trustees. To such trustees, however, he stood in a fiduciary relation, and on the strength of it received property from them. What he received from his own clients he received under a trust to them. Whether his estate is liable after this lapse of time on the ground of an express trust between himself and the original cestui que trusts becomes unimportant, since his estate remains clearly liable on this ground to his own clients, the trustees, one of whom is a plaintiff, and, indeed, this liability is one of which the original cestui que trusts under the

(1) 18 Ch. D. 254.
(2) 21 W. R. 137.
(3) 34 Ch. D. 462.
(4) [1892] 1 Ch. 154.

trust would be entitled to the benefit in a properly constituted suit, not because the defaulter was their own trustee, but because he was bound under a direct trust to persons who were the trustees.

On this simple ground, whatever other law or equity may or may not be applicable to the matter before us, whatever may be the limitations or definitions to be introduced into the doctrine of the Statute of Limitations and constructive trusts, this case (which is one of express or direct trust) lies outside them all.

I am of opinion that the appeal must be allowed, and that the plaintiff is entitled to succeed with costs both here and below.

KAY, L.J. This action is brought by the surviving trustee under a will, who is also the cestui que trust, against the representative of a deceased person named Ashwell, who was solicitor to the trust, claiming an account of part of the trust fund received by him.

Under the trust a sum of 256*l.* was held for two persons for their respective lives, and, after the death of each, his share was in trust for his children. This sum of 256*l.* Ashwell, as solicitor to the trust, invested, with other moneys belonging to different trusts, upon an equitable mortgage by deposit of deeds, apparently in his own name. In January, 1879, this mortgage was paid off, and the 256*l.* was paid by the mortgagor to Ashwell. One moiety of this sum was distributed, the tenant for life of that moiety having died, among his children, who were absolutely entitled to it. What became of the other moiety—128*l.*—does not clearly appear; but it was not paid to the trustees or invested in their joint names, and, therefore, Ashwell, it must be inferred, retained it in his own hands. Ashwell died in November, 1879. The tenant for life of this moiety died on July 5, 1886. Thereupon the plaintiff became entitled to it absolutely. The interest had been paid during the life of the tenant for life by a clerk of Ashwell's, who was employed in winding up his business. Whether such payments were made by any authority of Ashwell's representative, which would prevent the Statute of Limitations running, is not very clear. This action was begun on February 21, 1891, twelve years after Ashwell had received the mortgage-

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money, but within six years after the death of the tenant for life, when the plaintiff's title as cestui que trust vested in possession. The defendant, who is the legal personal representative of Ashwell, pleads the Statute of Limitations.

The first answer made to this is that Ashwell was an express trustee of the fund.

Generally speaking, a person who is not the appointed trustee and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were; which is commonly expressed by saying that he is not an express but a constructive trustee. An express trustee, primâ facie, is a trustee appointed by the author of the trust, or under a power created by him, or by the Court under the Trustee Act. But, where the case is that it is sought to affect a stranger or to make him responsible as a trustee, that must be by evidence of facts not contained in the original declaration of trust. One of the reasons for the distinction between an express trust and a trust raised by implication of law upon external facts of that kind is, that the lapse of time, which may have destroyed important evidence, renders it unjust to take such a case out of the operation of the Statute of Limitations. Here the trust is expressed by the will, and no external evidence is wanted to establish that. But, it may be argued, such evidence is requisite to make out that Ashwell was bound by the trust, of which he was not an appointed trustee, and therefore this reason for the distinction appears to apply to this case. Ashwell is dead. His evidence might have been conclusive against the claim. He might have disproved all the facts relied on to make out that he was a trustee. For instance, he might have proved that he never received the money, or that, having received it, he paid it over to the trustees. Ought he not to be considered only constructively a trustee, and is not the statute on this ground a proper defence?

In *Townshend* v. *Townshend* (1) Lord Commissioner Ashurst says: "As to trusts being an exception to the Statute of Limitations, the rule holds only as between trustees and cestui que trusts; it is true that a trustee cannot set it up against his cestui que trust; but this is merely the case of a trustee by impli-

(1) 1 Bro. C. C. 550.

cation and as such affected by an equity; but that equity must be pursued within a reasonable time." This language is quoted by Sir William Grant in *Beckford* v. *Wade* (1), a case in the Privy Council, and Sir William Grant adds: "It is certainly true that no time bars a direct trust as between cestui que trust and trustee; but, if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of Equity to seek that relief."

The authorities do not seem to have drawn with any precision the line of distinction between express and constructive trusts.

In *Townshend* v. *Townshend* (2) land was conveyed in 1701 to trustees, to the use of the settlor for 500 years, and subject thereto to A. for life, with a proviso that, if A. paid a life annuity to the settlor and 500*l.* to his executors, the term should be void. The settlor died, having bequeathed the 500*l.* to his daughter. A. paid 500*l.* to the settlor's executrix, who assigned the term to a trustee for A.; and after his marriage A., in 1708, settled the term, with the concurrence of the trustee of it, by assigning it to other trustees, upon trust for himself for life, remainder to his wife for life, remainder to their children. Subsequently, by a deed in 1739 and a fine, A. conveyed the lands to other uses in favour of the defendants, and the term was assigned by the surviving trustee to attend, on the ground that this deed defeated the deed of 1708. The plaintiff claimed the benefit of the term under the deed of 1708; but, as his claim was not made till twenty years after his title accrued, the bill was dismissed on the ground that the defendants were merely trustees by implication.

(1) 17 Ves. 87.

(2) 1 Bro. C. C. 550.

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In *Bonney* v. *Ridgard* (1), stated by Sir William Grant, leasehold property was bequeathed in trust for the testator's children. The executrix sold it to a purchaser who had notice of the will under circumstances which satisfied the judge that the sale was a gross fraud on the part of both vendor and purchaser; but Lord Kenyon refused to "turn the defendants into trustees" because of the lapse of time, acting by analogy to the Statute of Limitations.

In *Wilson* v. *Moore* (2), merchants, by direction of an executor, applied moneys, of which they knew he was trustee, in discharge of his private debt to them; and it was held by Lord Brougham, L.C., affirming the judgment of Sir John Leach (3), that, having concurred in this breach of trust, they could not rely on the lapse of six years as a bar to the claim against them; they must be held to be trustees, and time would not run.

In *Life Association of Scotland* v. *Siddal* (4) a person, who was not actually trustee of a will, assumed to act and acted as though she were trustee, and she was held to be in the position of an express trustee. Turner, L.J., said: "If she had by writing declared herself to be a trustee, the trust in her could not have been otherwise than express, and her conduct is equivalent to her written declaration."

In *Bridgman* v. *Gill* (5), bankers transferred money from a trust account to the account of the tenant for life, who was indebted to them, in order to pay that debt, and it was held that, having been parties to this breach of trust, they could not avail themselves of the Statute of Limitations in answer to a claim by the trustees against them.

In *Robertson* v. *Armstrong* (6) the cestui que trust under a settlement of a fund sued the original trustees of a will, under which the fund was derived, and the solicitors of his own trustees of the settlement, who by direction of such trustees had received the fund and misapplied it, making such last-mentioned trustees also parties, and praying that the original trustees of the will and the solicitors of the settlement trustees might be

(1) 17 Ves. 97; see also 1 Cox, 145.
(2) 1 M. & K. 337.
(3) 1 M. & K. 126.
(4) 3 D. F. & J. 58.
(5) 24 Beav. 302.
(6) 28 Beav. 123.

ordered to pay the fund to the settlement trustees. The Master of the Rolls held that the will trustees were completely discharged by the payment to the solicitors of the settlement trustees, that the solicitors could only be made liable through the settlement trustees, and that they could not be reached in that form of suit, and he dismissed the bill. No question of the Statute of Limitations seems to have been raised; but the decision is important, because it shews that the proper suit is by the trustees against their agent, or by the cestui qui trusts against both the trustees and their agent, seeking to make both liable.

In *Lee* v. *Sankey* (1), a firm of solicitors were employed by the trustees of a will to receive the proceeds of real estate taken by a railway company. They received the money, and paid it in various sums from time to time to one of the trustees without the sanction of the other. Six years after the last of such payments the other trustee, who was tenant for life under the will, and her children, who were entitled to the fund subject to her life interest, sued the solicitors for restitution of the fund. It was held that the Statute of Limitations was no defence. I am not sure that the ground of this decision was not that the money retained the character of real estate, in which case the statutory period would be twenty years, which had not elapsed.

In *In re Bell* (2), the solicitor, who acted for a mortgagee selling the mortgaged estate under a power of sale, retained the balance of the purchase-money, and it was held that he became an express trustee of it, and that his executors could not rely on the Statute of Limitations.

Burdick v. *Garrick* (3), *Gray* v. *Bateman* (4), *Banner* v. *Berridge* (5), *In re Cross* (6), recognise that express trusts of personal property may be created either verbally or by conduct only, and that the 25th section of the Judicature Act, 1873, to quote the language of Baggallay, L.J., in the last-mentioned case, "is but a statutory declaration of a law which had always been recognised and administered in Courts of Equity." In the first of these

(1) Law Rep. 15 Eq. 204.
(2) 34 Ch. D. 462.
(3) Law Rep. 5 Ch. 233.
(4) 21 W. R. 137.
(5) 18 Ch. D. 254.
(6) 20 Ch. D. 109.

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cases it was held that agents entrusted with funds under a power of attorney, which authorized them to manage the real and personal property of their principal, to receive rents, to sell, to purchase land to be conveyed to or in trust for their principal, and to invest the residue in certain securities in the name of the principal or of some other person in trust for him, were in a fiduciary position, which disabled them from relying on the Statute of Limitations. Lord Hatherley, L.C., said: "How a person who is entrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see. That being so, the Statute of Limitations appears to me to have no application to the case." Giffard, L.J., concurred, relying on the very special power of attorney as an answer to the defence of the Statute of Limitations. "Under these circumstances," he said, "I have no hesitation in saying that there was in the plainest possible terms a direct trust created . . . and I do not hesitate to say that, where the duty of persons is to receive property and hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over the property to somebody entitled to it." This case was followed by Wickens, V.C., in *Gray* v. *Bateman* (1), where an agent who had acted for a person since deceased during his lifetime with full and unrestricted powers of managing his property was held to be a trustee who could not avail himself of the Statute of Limitations.

Barnes v. *Addy* (2) is an instructive and important authority. The surviving trustee of a fund, in exercise of a power of appointing new trustees, appointed a trustee of one moiety of the fund, remaining himself sole trustee of the other moiety. His solicitor advised against the appointment, but prepared the deed of appointment, and also a deed of indemnity from the new trustee. There was no suspicion of any intention on the part of the new trustee to misappropriate the fund, but he afterwards did so, and the cestui que trusts of the moiety so lost filed a bill against the original trustee and his solicitor, seeking to make them both liable as having concurred in a breach of trust. Lord

(1) 21 W. R. 137. (2) Law Rep. 9 Ch. 244.

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Selborne, L.J., held that the solicitor was not in the position of a trustee, saying this: "In this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to those who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers—transactions perhaps of which a Court of Equity may disapprove—unless those agents receive or become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest or fraudulent design on the part of the trustees." These words seem to me to define, as accurately as is perhaps possible, the difference between an express and constructive trustee. A stranger to the trust, who receives the trust money with notice of the trust, or knowingly assists the actual trustee in a fraudulent and dishonest disposition of the trust property, is a constructive trustee. The trust may be clear, may be declared in a written instrument, and may be in that sense express, but the stranger is not expressly appointed a trustee. He becomes bound by the trust by the construction which the law puts upon his dealings with the trust property.

The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence. Amongst these are the case where a stranger to the trust has assumed to act and has acted as a trustee, and the case where a stranger has concurred with the trustee in committing a breach of trust, and has taken possession of the trust property, knowing that it was trust property, and has not duly discharged himself of it by handing it over to the proper trustees or to the persons absolutely entitled to it.

I think that the present case comes within one or both those

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categories. I think that Ashwell did assume to act and acted as trustee of the funds which he received, and that he has not duly discharged himself from the plaintiff's share of those funds, and must therefore be treated as an express trustee.

The judgment must be reversed, and the appeal must be allowed, with costs here and below. If the executrix admits assets, there will be judgment for the plaintiff for the sum of 128*l.*, with interest at 4 per cent. since the last payment of interest. If assets are not admitted, there must be the usual judgment for an account, which should be transmitted to a Chancery judge to work out.

Appeal allowed.

Solicitors for plaintiff: *Clinton & Co., for H. P. Day, Nottingham.*

Solicitors for defendant: *S. G. Warner, for R. W. Miller, Nottingham.*

E. L.

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[IN THE COURT OF APPEAL.]

BARING BROTHERS & CO. *v.* THE NORTH WESTERN OF URUGUAY RAILWAY COMPANY.

Practice—Right to a Jury—Order XXXVI., *rr.* 4, 6, 7.

By Order XXXVI., r. 4, the Court may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Judicature Act, 1873, could without any consent of parties have been tried without a jury. By rule 6, in any other cause or matter, upon the application of any party thereto, an order shall be made for a trial with a jury. By rule 7, in every cause or matter, unless under the provisions of rule 6 of this order a trial with a jury is ordered—the mode of trial shall be by a judge without a jury.

The plaintiffs brought an action in the Queen's Bench Division in respect of a claim which before the Judicature Act, 1873, might have been sued upon either in Chancery or at common law:—

Held, that an application by the defendants for the trial of the action with a jury was properly refused, for the defendants could not claim a trial by jury as a matter of right, the case being one which before the Judicature Act could have been tried in Chancery, and which was therefore, within the meaning of Order XXXVI., r. 4, a cause which before the passing of the Act "could with-

out any consent of parties have been tried without a jury," and under rule 7 ought to be tried by a judge without a jury, unless otherwise ordered, and that the case was not altered by the fact that the plaintiffs had brought the action in the Queen's Bench Division.

APPEAL from the refusal of the Divisional Court (Grantham and Collins, JJ.) to order the trial of the action with a jury.

The action was commenced in the Queen's Bench Division, and the statement of claim contained allegations to the effect—(1.) That the defendants were a company incorporated under the Companies Acts. (2.) By a contract or concession dated August 8, 1885, the Republic of Uruguay guaranteed to the defendants for forty years 7*l.* per cent. on a sum of 420,000*l.*, being 5000*l.* for each kilometre of the railway to be made by the defendants. (3.) Prior to the contract mentioned in paragraph 4, 14,200*l.* was due from the Government to the defendants on October 31, 1889, and a further sum on April 30, 1890. (4.) On June 2, 1890, it was agreed that the plaintiffs should advance to the defendants 14,000*l.* "upon the terms (inter alia) that the defendants should undertake, in consideration of the plaintiffs advancing to the defendants the sum of 14,000*l.* on account of the amount then claimed by the defendants from the said Government under the guarantee aforesaid, to repay the said sum of 14,000*l.* so advanced immediately the same was received by the defendants from the said Government, and its being understood that the advance so made did not bear interest against the defendants, and was only repayable out of moneys to be received from the said Government on account of the said guarantee, and the defendants accordingly gave their undertaking under seal to the said effect upon plaintiffs making the said advance." (5.) That the defendants had received from the said Government upwards of 3000*l.* in cash. On May 10, 1892, the defendants, without the plaintiffs' consent, received from the said Government in respect of the payments to be made under the guarantee for the period from May 1, 1889, to December 31, 1891, amounting to 69,444*l.*, bonds of the said Government to the amount of 106,838*l.*, "and accepted the same in satisfaction and discharge of the said payment due in respect of the said period." (6.) The defendants refuse to repay the said advance. The plaintiffs claimed—"(i.) 14,000*l.*

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(ii.) Interest thereon at the rate of 5*l.* per annum from May 17, 1892, till payment or judgment. (iii.) A declaration that the defendants were, in respect of any debts or moneys due or payable under the said guarantee, trustees for the plaintiffs until their said advance had been fully paid; and were not entitled to accept the said bonds in discharge of the money payments due to them from the said Government, to the prejudice of the plaintiffs' rights to the repayment of their advance out of the moneys payable under the said guarantee, and were not entitled to deal with the bonds to the prejudice of the plaintiffs, and without first duly repaying the amount of the said advance to the plaintiffs." London was named as the place of trial.

Issue having been joined, the defendants applied to have the action tried with a special jury in the City of London. The master refused the application, and his decision was affirmed by Wills, J., and the decision of Wills, J., upheld by a Divisional Court (Grantham and Collins, JJ.). The defendants appealed.

Finlay, Q.C., and *Brooke Little*, for the defendants. The plaintiffs contend that this action, if brought before the Judicature Acts, might have been brought in Chancery, and would in that case have been tried without a jury, and that it therefore comes within Order XXXVI., r. 4, and must be tried by a judge without a jury, unless otherwise ordered. But the defendants are entitled to have it tried by a jury, for it is a common law action which could not have been brought in Chancery. But supposing that the action could have been commenced in either Division, the plaintiffs have elected their forum, and, as they have brought their action in the Queen's Bench Division, the practice of that Division must be followed. They have in fact elected not to treat it as a Chancery proceeding. The contention of the plaintiffs would lead to absurd conclusions. A claim for collision between ships could before the Judicature Acts have been brought either in the Court of Admiralty or in one of the Common Law Courts. If brought in the former, it would have been tried without a jury. Can it be held that now an action for collision in the Queen's Bench Division is to be tried without a jury?

Bigham, Q.C., and *Danckwerts*, for the plaintiffs. The decision of the Divisional Court went on the ground that this case might before the Judicature Acts have been tried in Chancery, and so tried by a judge alone without any consent of parties, and that Order XXXVI., r. 4, therefore applies. The rule must be taken to apply wherever an action might before the Judicature Acts have been brought in Chancery. But in fact this is a Chancery proceeding, and the action could not before the Acts have been brought in a Common Law Court.

Brooke Little, in reply. If the Court has a discretion it will not exercise it to deprive a party of his right to a trial by jury. *Coles* v. *Civil Service Supply Association* (1), and *Fennessy* v. *Rabbits* (2), support the view that the defendants are entitled to a jury as a matter of right. This is not an action assigned to the Chancery Division, for no execution of a trust is asked. In Chancery an action like the present would have been dismissed for want of equity: *Hammond* v. *Messenger* (3); *Rolt* v. *White*. (4) It is purely a common law action, and could not before the Judicature Acts have been tried without a jury except by consent.

LINDLEY, L.J. This is an appeal by the defendants, who apply for a trial by jury. Why they should want a trial by jury I cannot understand, for there is really nothing to be tried that requires the assistance of a jury as distinguished from the decision of a judge. But it is said they have a right to a jury under rule 6 of Order XXXVI., and if they have a right to it they need not give any reason for claiming that right. It strikes me, however, that this case is not within rule 6. The action is one as to which we have to go back before the Judicature Acts to consider whether it could have been brought in the Chancery Division or in the Queen's Bench, or in either of them. From one point of view this action may be regarded as being based on the theory of trusteeship. If that is the true view, it would come within rule 3, and would be an action assigned to the Chancery Division. Another possible view is that it is a mere action for damages, or a common law action for money had and received.

(1) 53 L. J. (Ch.) 638.
(2) 56 L. T. 138.
(3) 9 Sim. 327.
(4) 31 Beav. 520.

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Lindley, L.J.

The substance of the case is a dispute between the plaintiffs and the defendants as to what ought to be done with certain bonds or moneys representing bonds which have come to the defendants from one of the South American Governments. There is a controversy between them on the construction of a document which does not require the assistance of a jury in the least degree. The plaintiffs say in substance, "You are bound by that document to apply these bonds or those moneys in a particular way." That is the dispute.

When we look at the rules and refer back to the exposition of them given in a case about which we took considerable trouble, *Jenkins* v. *Bushby* (1), we find that it is now settled that the expression "in any other cause or matter" in rule 6 refers to all causes or matters not previously referred to. Amongst those causes or matters previously referred to are causes or matters which previously to the passing of the principal Act—that is, the Judicature Act, which came into operation in 1875—"could without any consent of parties have been tried without a jury." If once you find that this is such a cause or matter, then the rule primâ facie applicable to it is rule 7, which says that cases of that description are to be tried by a judge without a jury, unless otherwise ordered.

The case then is reduced simply to this, whether this is a cause or matter which previously to the passing of the Judicature Act "could without any consent of parties have been tried without a jury." It appears to me that it is. It is a cause or matter which might have been brought in the Court of Chancery before the Act, and if so brought it could, without consent of parties, have been tried without a jury. It therefore comes within the words, "which could without any consent of parties have been tried without a jury." It is also true that if the action had been brought on the common law side it might have been so framed as to turn it into a common law action; but it is still a cause or matter which previously to the passing of the principal Act "could without any consent of parties have been tried without a jury." The point is not whether the early part of rule 4 applies, but the question is whether this case comes within the

(1) [1891] 1 Ch. 484.

language of rule 6, "in any other cause or matter," which refers us back to causes and matters previously mentioned, among which are all causes or matters which could before 1873 have been tried without any consent of parties without a jury. Such causes and matters under rule 7 are to be tried by a judge without a jury, unless otherwise ordered. The counsel for the defendants have tried to reduce that to an absurdity by saying that an action for collision might be brought either in the Admiralty Division or at common law, and it would be absurd to hold that because in the former it would be tried without a jury it must therefore, if brought at common law, be tried without a jury. But a discretion is given by rule 7 which prevents any inconvenience.

I think the view which has been taken in the Court below is the right view, and that this appeal must be dismissed.

LOPES, L.J. The defendants here want a trial by jury. Their application has been refused before the Master and before the Divisional Court, and now they come here and say they have a right to a trial by jury under Order XXXVI., r. 6. I think that is not so. An interpretation has been put by the case of *Jenkins* v. *Bushby* (1) on the early words of that rule, "in any other cause or matter." In that case we interpreted "in any other cause or matter" as meaning "in any cause or matter other than those mentioned in the preceding rules"—thus preserving the right to any party to have a trial with a jury except in the causes or matters mentioned in rules 3, 4, and 5. I think therefore that there is no right to a jury under rule 6 in any cause or matter mentioned in any of those three rules.

Now the question is, under what rule does this case come? Does it come under rule 3? I think not. I think it cannot be regarded as an action assigned to the Chancery Division. Then there is rule 4, and in my opinion that is the rule under which this case comes. The question which arises under that rule is this. Is this a cause or matter which previously to the passing of the principal Act could without any consent of the parties have been tried without a jury? In my opinion it is such a

(1) [1891] 1 Ch. 484.

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cause or matter as could before the passing of the principal Act have been tried without any consent of parties without a jury. If that is so, having regard to the circumstances of this case, I can see no reason why that rule should be in any way departed from. I cannot see myself what occasion there is for a jury here. It seems to me that the case will turn very much upon the construction of the document mentioned in paragraph 4 of the statement of claim. However that may be, in my opinion it comes within Order XXXVI., r. 4, and therefore I think the decision of the Master and of the Court below was right.

Appeal dismissed.

Solicitors: *Darby & Cumberland; Norton, Rose, Norton & Co.*

H. C. J.

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[IN THE COURT OF APPEAL.]

HANNAY & CO. AND OTHERS *v.* SMURTHWAITE AND OTHERS.

Practice—Parties—Plaintiffs, Joinder of—Causes of Action, Joinder of—Joinder of several Plaintiffs in respect of separate Causes of Action—Order XVI., r. 1; *Order XVIII., rr.* 1, 8.

The several shippers of different shipments of cotton, shipped on the same ship for carriage from and to the same places, having joined as plaintiffs in one action, claiming against the shipowners upon the bills of lading given to them respectively damages for short deliveries:—

Held, by Lord Esher, M.R., and Kay, L.J. (Bowen, L.J., dissenting), that they were entitled so to join under Order XVI., r. 1, coupled with Order XVIII., r. 1, subject to the power of the Court or a judge under Order XVIII., r. 1 or 8, if it should subsequently appear that any of the claims could not conveniently be tried or disposed of with the others, to order that separate trials should be had, or to make such other order as might be necessary or convenient for the separate disposal thereof.

APPEAL of plaintiffs from an order of a Divisional Court (Day and Collins, JJ.), directing a stay of proceedings in the action as after mentioned.

The facts were as follows. The several plaintiffs were the respective shippers and consignees of eight different lots of bales of cotton which had been shipped on a ship of the defendants at Galveston, in the United States, for carriage to Liverpool. Bills

of lading had been given to the respective shippers by the defendants' agents at Galveston, specifying respectively the number of bales in each shipment and the marks upon them. The plaintiffs sued in one action upon their respective bills of lading for damages for short deliveries to them respectively at Liverpool. The statement of claim gave particulars of the number and marks of the bales alleged not to have been delivered out of each shipment, and the amounts claimed for non-delivery of such bales by the respective shippers and consignees in the case of each shipment, and claimed in conclusion an aggregate total of 287*l.* 19*s.* 2*d.* The total number of bales claimed for as not delivered was thirty-three. The bills of lading respectively exempted the shipowners from liability for loss or damage occasioned by causes beyond their control, or breakage, or arising from insufficiency of packages, or for land damage, or for errors, insufficiency, or absence of marks, numbers, address or description, or for accidental obliteration thereof. The statement of defence alleged, inter alia, that all cotton shipped or received for shipment on board the ship was duly delivered; that, if any portion of the cotton mentioned in the bills of lading was not delivered, the same never was shipped or received for shipment on the ship, and the captain had no authority to sign bills of lading for it. It also set forth the exemption clause contained in the bills of lading, and stated that, if any of the cotton shipped was not delivered, the same was occasioned by the causes therein mentioned. It further stated that the agents at Liverpool of the charterers of the ship before action tendered to the plaintiffs eighteen bales of cotton, which were discharged from the ship without marks, and the plaintiffs refused to receive the same: that the said agents subsequently, with the plaintiffs' consent, sold the said bales, and before action, without admitting liability, paid to the plaintiffs certain specified sums, and that the sums so paid were sufficient to satisfy the plaintiffs' claims.

It appeared that on the arrival of the ship at Liverpool the number of bales of cotton which she had on board was short of the aggregate total of the numbers specified in the respective bills of lading by fifteen bales, and that eighteen of the bales

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discharged had no marks upon them. The cotton on its discharge at Liverpool had, it was stated in argument, been delivered to the "master porter" appointed under the by-laws of the port to receive the same upon its discharge. The bales which had marks were delivered to their respective consignees, and the unmarked bales had been sold by arrangement and their proceeds handed over to the respective consignees rateably without prejudice to their claims. On the application of the defendants, the Divisional Court, reversing the decision of Mathew, J., at chambers, ordered a stay of proceedings until the plaintiffs should elect which of their respective claims should be proceeded with, on the ground that the plaintiffs could not join in suing, but should have brought separate actions in respect of their respective claims.

July 25. *Finlay, Q.C.*, and *Carver*, for the plaintiffs. There are substantial grounds upon which under the circumstances of this case the plaintiffs desire to join in suing, and it is contended that under the rules they are entitled to do so. The bills of lading exempt the defendants in respect of obliteration of marks, and they may contend in answer to the claim of any shipper suing alone that delivery to the "master porter" is by the custom of the port a good delivery, and that they can attribute a sufficient number of the unmarked bales to such shipper to make up the total of his shipment. To meet this, the shippers desire to go into all the facts relating to the various shipments as a whole. There would, therefore, be a community of evidence in all the cases, and of interest among the plaintiffs; and that shews that the cases of the different plaintiffs sufficiently form one transaction to admit of their joining in one action under the existing rules as interpreted by the cases.

Order XVI., r. 1, allows any number of plaintiffs to be joined in respect of any number of causes of action alleged to be vested in them jointly, severally, or in the alternative. There is no limit under the terms of that rule to the power of joining plaintiffs in respect of wholly different claims. But no inconvenience or mischief can arise in consequence, for such power of joining plaintiffs is subject to the power of the Court under other rules

to disallow such joinder, where it would be embarrassing or inconvenient: see *Booth* v. *Briscoe* (1), and per Lord Esher, M.R., in *Gort* v. *Rowney*. (2) In *Booth* v. *Briscoe* (1), where the trustees of certain charities joined in an action for a libel upon them in respect of their management of the charities, it is clear that there was no joint cause of action, because there was not any joint damage, as in a case of defamation of partners such as *Forster* v. *Lawson*. (3) Each plaintiff had a wholly distinct cause of action; and yet, it was held that they were rightly joined. Any difficulty that may be suggested in respect of the joinder of several plaintiffs with different causes of action may equally arise in respect of the joinder by one plaintiff of different causes of action. In either case the Court would have power to prevent any inconvenience or embarrassment by ordering separate trials under Order XVIII., r. 1, or striking out plaintiffs under Order XVI., r. 11. In *Sandes* v. *Wildsmith* (4) it was, no doubt, held by the Divisional Court that two plaintiffs could not join in an action alleging different slanders, some of one plaintiff and some of the other; but it is submitted that that decision is not reconcilable with *Booth* v. *Briscoe* (1), except so far as it may be considered to have proceeded on the discretionary power of the Court to disallow such a joinder. Indeed, if the terms of Order XVI., r. 1, are construed as giving power in any case to join several plaintiffs in respect of separate causes of action, it is difficult to see how any limitation of such power can be extracted from the terms of that rule with reference to the question whether or not the separate causes of action do or do not arise out of the same transaction or set of circumstances, or whether or not the same evidence would be applicable to them; though, of course, such considerations would be material with reference to the discretion given by Order XVIII., rr. 1, 8.

Assuming, however, that some limitation of that sort could be imposed upon the terms of the rule, it is submitted that in this case the separate causes of action of the different plaintiffs have such a community in respect of their subject-matter and circumstances as to bring the case within the scope of the rule.

(1) 2 Q. B. D. 496.
(2) 17 Q. B. D. 625.
(3) 3 Bing. 452.
(4) [1893] 1 Q. B. 771.

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[They also cited *Ayscough* v. *Bullar* (1); *Arnison* v. *Smith* (2); *Burstall* v. *Beyfus*. (3)]

Bigham, Q.C., and *Pickford*, for the defendants. The expression, "*the* right to any relief," used in the rule shews that the case really contemplated is that in which it is doubtful whether some one right is vested in one or all or some of several persons, not a case where wholly different rights are vested in different persons. Assuming that the effect of *Booth* v. *Briscoe* (4) is that under certain circumstances several plaintiffs may join in respect of separate causes of action, that case did not decide, and the rule cannot mean, that any number of plaintiffs, in whom respectively any rights to relief, however different and disconnected, are alleged to exist, can all join in one action. If this had been the intention, much plainer language would have been used. It is submitted that the rule must be limited to cases where the right to relief of the same nature is claimed as arising out of the same contract or wrongful act. There is no case in which plaintiffs have been allowed to join in respect of breaches of wholly separate contracts, or in respect of wholly separate wrongful acts. In *Booth* v. *Briscoe* (4) this point does not seem to have been argued, but was taken by the Court itself. It was too late to take the point in that case, as it was in *Gort* v. *Rowney* (5); and there the libel was one and the same with regard to all the trustees. In *Ayscough* v. *Bullar* (1) it was the same covenant in respect of which each plaintiff was interested. *Burstall* v. *Beyfus* (3), which was decided on the words of the corresponding rule as to joinder of defendants, viz., Order XVI., r. 4, is an authority in favour of the defendants.

Assuming that the case comes within the terms of Order XVI., r. 1, it is admitted that the Court has a discretion under other rules whether it will allow the joinder of plaintiffs whose claims are several. With regard to this question, Lord Bramwell, in *Booth* v. *Briscoe* (4), and Wills, J., in *Sandes* v. *Wildsmith* (6), suggest that a good test is afforded by the question whether, if separate actions were brought, an order for consolidation could

(1) 41 Ch. D. 341.
(2) 40 Ch. D. 567.
(3) 26 Ch. D. 35.
(4) 2 Q. B. D. 496.
(5) 17 Q. B. D. 625.
(6) [1893] 1 Q. B. 771.

be made. It is submitted that in this case no such order could be made. One of the questions in the case of each of the claims for short delivery would be whether the quantity mentioned in the bill of lading was really shipped at Galveston. Assuming that the cases of all the plaintiffs have some community of features with regard to what took place at the port of discharge, the circumstances and evidence with regard to shipment will be entirely different in each case, and it would be extremely embarrassing and inconvenient to mix up all the cases together. The case of *Westbrook* v. *Australian Royal Mail Steam Navigation Co.* (1) shews that there could not be a consolidation in such a case as this.

Finlay, Q.C., in reply, referred to *Coryton* v. *Lithebye* (2) and *Weller* v. *Baker*. (3)

Cur. adv. vult.

Aug. 11. The following judgments were delivered:—

LORD ESHER, M.R. In this case a ship, of which the defendants were owners, appears to have been put up in a foreign port as a general ship, for the purpose of loading cotton to be carried to Liverpool; and shipments of cotton were made by different shippers, who received separate bills of lading with regard to their respective shipments. These bills of lading stated in each case the number of bales shipped and the marks upon them, and contracted for delivery of such bales accordingly, but contained a stipulation that the shipowners should not be liable for loss or damage occasioned by absence or accidental obliteration of marks. The ship, being so loaded with these consignments of cotton, arrived at Liverpool, and, with regard to several of the shipments, it is alleged that there was a short delivery. It appears that a certain number of bales with marks were delivered to the respective shippers; and there were a certain number of bales which, on arrival at Liverpool, had no marks or numbers; but there were not so many of these unmarked bales as would be necessary to make up the total number of bales which had to be delivered to the shippers. Under these circumstances the

(1) 14 C. B. 113. (2) 2 Wms. Saund. 115.
(3) 2 Wils. 414.

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shippers of these shipments join as plaintiffs in bringing an action against the shipowners upon their respective bills of lading for short delivery. It is said that this case raises a question of great importance to the cotton market at Liverpool: it has been suggested that the shipowners desire to put the shippers respectively in this dilemma—they wish to say, in answer to the claim of each shipper, that they have brought to Liverpool and delivered there to the master porter all the bales that were shipped by him, and that, a certain number of bales with proper marks having been delivered to the particular shipper, they can attribute to him, in order to make up the full amount of his shipment, a sufficient number of the bales that have arrived without marks. Therefore they seek to compel the plaintiffs to bring separate actions, and to say to each shipper in turn that he has no right to go into the facts as to any other shipment, that he shipped a certain number of bales, and that number has been delivered, because so many have been delivered with marks, and so many out of those which are without marks must be attributed to his shipment. In other words, they wish to have the power of utilizing the unmarked bales against each of the plaintiffs. I do not believe that they could succeed in so doing. I should think that in each action, where they tried to do that, the particular shipper would be entitled to shew that other persons had also shipped bales of cotton on board the ship, so that the shipowners could not say whether the unmarked bales belonged to him or not. If that be so, and if there must be a number of separate actions, then the whole of the transaction with regard to these shipments must be gone into in each action. What would be the result? The expense would be greatly increased; there must be a writ by each of thirty-six or forty shippers with its stamps and fees; statements of claim and pleadings in each action with fees for instructions and drawing; services; notice of trial in each; entry of trial for each: in the end all the actions would stand for trial at Liverpool in a row; the judge would have to hear all the evidence in the first action; and then, if either of the parties were perverse or unreasonable enough to insist upon it, he must hear it all over again in the next action, and so on, the result being a lament-

able waste of money and time. The question is whether this must be so according to the rules, or whether the Court can allow the plaintiffs to join in one action, subject to the power, if it should turn out that the case of one or more of the plaintiffs could not conveniently be tried with the others, to order that it should be tried separately. I feel sure myself that the defendants' real case depends on what took place with regard to delivery at Liverpool. It was ingeniously suggested, I know, that the case with regard to each shipment will be different, and that a question will arise as to each whether the full number of bales mentioned in the bill of lading were loaded. I do not see how that can be so with regard to all the cases; and, if in any particular case the defendants wish to set up that the full number were not loaded, let them do so; and then, if there should be any difficulty in trying that case with the others, the judge at the trial or a judge at chambers can say that, if that is the real defence, that case shall be tried separately. But I cannot myself see that there would be any difficulty in trying all these cases together, even if that point should be raised. It will lie on the defendants to shew that the full number of bales in any case were not loaded, and that matter could be tried in half-an-hour. The question in this appeal really comes to this, viz., whether we are obliged to say that the defendants have an absolute right to compel the plaintiffs to bring separate actions. Let us see, then, whether the rules compel us to say that the plaintiffs cannot bring one action.

It must be admitted at the outset that each of the different shippers has a separate cause of action, for the contracts as to the respective shipments are separate.

The first rule which we have to construe—viz., Order XVI., r. 1—says: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment." It seems to me that this case comes within those very words, so far as their grammatical construction is concerned. But I do not think that practical

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rules ought to be construed according to mere grammar, if that which is an absurdity from a business point of view is thereby produced. I should say that, large as the words of the rule are, if the causes of action vested in the plaintiffs respectively were not merely separate causes of action, but were in respect of utterly distinct and different transactions, then the plaintiffs could not join in one action in respect of them because the result would be an absurdity. But if the different causes of action or claims all arise out of the same transaction, and no absurdity could result from their being joined in one action, then why should the grammatical effect of the words of the rule be diminished to prevent their being so joined? That view of the matter gives rise to the question whether in this case all the claims sufficiently constitute one transaction to bring the case within the rule without giving rise to any absurdity, such as was suggested, as, for instance, if one plaintiff were allowed to sue on a bill of exchange and another for breach of promise of marriage in the same action.

The real ground of complaint here is the conduct of the owners of a particular ship on a particular voyage with regard to the loading of the ship and the conveyance of certain bales of cotton to Liverpool. It is one transaction giving rights of action to different people who have entered into that one transaction. I think that that is sufficient to bring the case within the terms of the rule.

Such is the construction which I put on Order XVI., r. 1; but, if any hardship or inconvenience could arise from such construction, it must be observed that the terms of the rule are modified and explained by Order XVIII., r. 8, which provides that, upon an application by the defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, the Court or a judge may confine the action to such of the causes of action as may be conveniently disposed of together; and by Order XVIII., r. 1, it is provided that "the plaintiff may unite in the same action several causes of action; but, if it appear to the Court or a judge that any of such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of

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such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." It is true that these rules speak of the "plaintiff" in the singular; but in my opinion the effect of Order LXXI., r. 2, is that "plaintiff" must be read as meaning "plaintiffs" for this purpose. So that any defendant alleging that plaintiffs have joined causes of action that cannot conveniently be tried or disposed of together may apply for an order providing for the separate disposal of such causes of action; and, therefore, any injustice or inconvenience that might arise in such a case could be met under Order XVIII., rules 1 or 8. In such a case as this, if a judge should come to the conclusion that the defendants really did mean to assert and prove, as part of their defence, that any of the plaintiffs had made a short shipment, and that the suggestion to that effect was not merely an ingenious statement of counsel in order to force the plaintiffs to bring separate actions; and if he should think that that particular defence against that particular plaintiff could not fairly be tried at the same time as the cases with regard to the other plaintiffs, then he could order that case to be separated from the others. On the other hand, if he should think that there would be no injustice or inconvenience occasioned, he would refuse to make an order and allow all the cases to be tried together.

I do not think that the view which I am taking in this case is contrary to any of the cases which have been decided on the subject. I know that my brother Bowen will refer to some expressions used by Lord Selborne in the case of *Burstall* v. *Beyfus* (1), which appear to tend in the opposite direction to my view; but that case concerned another rule, and did not decide the true construction of Order XVI., r. 1.

I think that this appeal must be allowed to this extent: We must hold that the plaintiffs have a right to bring this action, subject, however, to this, viz., that, if the defendants can shew to the satisfaction of the judge about to try the case, or a judge at chambers, that it would be unfair or inconvenient that the case of any particular plaintiff should be tried with the others, they may obtain an order directing that it should not be so tried.

(1) 26 Ch. D. 35.

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BOWEN, L.J. This case depends mainly upon the construction of Order XVI., r. 1. After giving the case a great deal of consideration, I cannot quite take the same view as the Master of the Rolls has taken of that rule. I do not know that our divergence of opinion as to the effect of the rule is really of very great moment; but, as I do differ to some extent from his view, I ought to state my own opinion of the meaning of the rule.

I do not think that it was the intention of this rule to allow writs to be issued under which any number of plaintiffs might join any number of causes of action, or that a writ should be like an omnibus travelling on a certain route into which any number of persons may get as passengers for the journey. The question is to what extent the rule allows joinder of plaintiffs, and whether any limitation already exists in or must by reasonable implication be read into its terms.

It is impossible, I think, to understand the rule without considering the history of the legislation on this subject, which impresses me very much, as well as the special language in which the rule is framed.

The law with regard to joinder of plaintiffs was pretty clear before the Judicature Act. It had been amended by the provisions of the Common Law Procedure Act of 1852 and 1860. The rule was that, in the case of contract, all persons with whom the contract sued on was made had to join as plaintiffs, and no person could join himself as plaintiff in an action for breach of a contract made by the defendant with another person. With regard to torts, I think the law may be properly summed up as follows: persons who had a joint interest were bound to sue jointly, while persons who had several interests were bound to sue separately; but where persons, although they might have several interests, had sustained joint damage, they might sue jointly also. An instance of the application of the rule as to torts occurs in the case of the dippers of Tunbridge Wells: *Weller* v. *Baker* (1), where, although the dippers received separate gratuities, they had a joint interest. Another case illustrative of the rule is that of libel. Where persons carrying on business in partner-

(1) 2 Wils. 414.

ship were made the subject of one libel, and they sued for the separate damage to their individual reputations, they could not join; but it was otherwise where they sued for damages done to them by the libel in the way of their joint business, a form of action which perhaps scarcely belongs to the category of libel properly so called, but is rather an action on the case for false or malicious statements causing damage to property.

Such was the old law long before the Judicature Act, and in order to understand the rules made under that Act I think it is necessary to refer to the changes made by the Common Law Procedure Act, 1852. Sect. 34 of that Act provided that non-joinders and misjoinders of plaintiffs might be amended by the order of the Court or a judge. As to joinder of causes of action, there was a separate provision altogether. Sect. 41 enacted that causes of action of whatever kind, except replevin and ejectment, provided they were by and against the same parties and in the same rights, might be joined in the same suit, but that if the trial of different causes of action together would be inexpedient separate trials might be ordered. Accordingly that Act kept quite distinct the two matters, viz., the constitution of the suit, which depended on the joinder of parties, and the law as to the joinder of causes of action after the suit had been properly constituted.

Then came the Common Law Procedure Act of 1860, which by s. 19 provided that joinder of too many plaintiffs should not be fatal, and the terms of which are very material. They are as follows: "The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist." It still appears, therefore, to have remained the theory of the legislation on the subject that there must be a particular legal right, in respect of which the action was to be brought, and which must be supposed to exist in certain persons. The section goes on: "and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them; or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover." The effect was that the

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action was not to be defeated by reason of its being brought in the name of too many plaintiffs; but, subject to this qualification, the law as laid down in the cases, of which *Bellingham* v. *Clarke* (1) and *Stubs* v. *Stubs* (2) are examples, still prevailed, and it was a misjoinder to join as plaintiff in an action of contract a person who was not alleged to be a party to the contract, or to join as plaintiffs in an action of tort persons who had not suffered joint damage. The legislation, as it then stood, still left possibilities of injustice and miscarriage, and an action might still be defeated by a difficulty in shewing in which particular plaintiff, out of two or more, the right of action existed.

Then come the Orders under the Judicature Act, which present the same division of subject-matters as was presented by the Common Law Procedure Act, 1852. Order XVI., r. 1, first deals with the right constitution of the action, i.e., the joinder of the right parties. Then Order XVIII., r. 1, deals with joinder of causes of action as a distinct subject-matter. We have to deal first with the right constitution of the action. I cannot think that it ever could have been intended that any number of plaintiffs might take out one writ and join in it any number of causes of action wholly disconnected with one another, which might be vested in them respectively. If such a thing had been intended, one would have expected to find very different and much plainer language used to express such intention. It appears to me that the language used follows the lines on which the previous legislation had proceeded, and still keeps in sight the idea that after all the object of an action is relief in respect of a cause of action, and persons ought not to join as plaintiffs unless in the hope of making themselves out to be interested in such cause of action either jointly or severally, or in the alternative. The terms in which Order XVI., r. 1, is drawn seem to me to indicate its scope and intention. The words are, not "any right to relief," but "*the* right to any relief." There are two things which seem to me to indicate that the rule was not intended to have the sweeping effect suggested. The first is the use of the expression, "*the* right to any relief"; and, secondly, there is the provision for

(1) 1 B. & S. 332. (2) 1 H. & C. 257.

claiming relief "jointly, severally, or in the alternative," which seems to me to follow the lines of the legislation contained in s. 19 of the Common Law Procedure Act, 1860. If the intention had been as suggested for the plaintiffs, those words would have been unnecessary. These expressions seem to me to shew that those who drew the rule had their minds fixed on the identity of the relief claimed, and merely intended to prevent the claim from being defeated by the defendants' being able to say to each of the plaintiffs separately that some one else ought to have been plaintiff.

If the word "transaction" is used in one sense, I do not know that I should differ very much from the proposition enunciated by the Master of the Rolls—viz., that there must, to bring the case within the rule, be identity of the transaction in respect of which relief is claimed by the plaintiffs. If by "identity of the transaction" it is meant that the transaction is the same and the only question is, in whom the legal right to relief in respect of it exists, and to whom the damage has been done in the eye of the law, then I do not know that there would be much difference between our views; but if a popular meaning is to be given to the word "transaction," and it is used as meaning that because a certain element of evidence is common to two or more transactions, they are to be treated as one for this purpose, then I cannot agree with the view of the Master of the Rolls. I think that there must be identity in all respects except as to the question who is the right person to sue, and who is the person injured. But I prefer not departing from the words of the rule or involving myself thereby in the necessity of defining a "transaction" which is after all an expression used nowhere in the rule.

Then does Order XVIII., r. 1, affect the case? That rule relates, in my opinion, only to joinder of causes of action; it assumes that the action has been rightly constituted under Order XVI., r. 1. It only provides, where parties have been rightly joined under that rule, what may be done by them as to joining separate causes of action.

How do the authorities on the question stand? The earliest case on the subject is *Booth* v. *Briscoe*. (1) It will be remembered

(1) 2 Q. B. D. 496.

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how the law of libel previously stood as to joinder of plaintiffs. If there was no joint damage, a number of persons libelled together could not sue together; but partners might sue together if there was a false and malicious statement causing joint damage to them in the way of their business. *Booth* v. *Briscoe* (1) was a case in which there was a libel, not on partners in the way of their trade, but on certain trustees. It could not be said that there was any joint damage, because the libel did not inflict injury on them in any trade which they were carrying on jointly. The damage was inflicted on them separately, although the libel attacked them jointly as trustees. That case came just outside the law as it existed before the Judicature Act. Bramwell, L.J., and Brett, L.J., thought that the case fell within the scope of rule 1 of Order XVI., and as to such a case we are no doubt bound by that decision. There the right to relief was claimed in respect of the publication of one document which had injured the plaintiffs respectively, and the Court appear to have thought, that being so, that the fact that each plaintiff had a separate cause of action in respect of that one document so published did not take the case out of the rule. That, no doubt, was in that case a beneficial interpretation of the rule, if the case fell within its language. In *Gort* v. *Rowney* (2) there was no decision on this point; but the same slight divergence of opinion as to the effect of the rules arose between the Master of the Rolls and myself as in the present case, and we travelled to the result at which we both arrived in that case on somewhat different lines. But then we have the very important authority of Lord Selborne in *Burstall* v. *Beyfus*. (3) That was a case in which the cause of action against one defendant was wholly disconnected with the cause of action against the other defendants. It was held that, unless there was identity of the transaction in the sense in which I have used the term, there would be a misjoinder of defendants. Lord Selborne, L.C., in giving judgment emphasized the distinction I have pointed out between the objects of Order XVI., r. 1, and those of Order XVIII., r. 1, between joinder of parties and joinder

(1) 2 Q. B. D. 496. (2) 17 Q. B. D. 625.
(3) 26 Ch. D. 35.

of causes of action. He said: "To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected in the way I have suggested), is not contemplated by Order XVIII., r. 1, which authorizes the joinder, not of several actions against distinct persons, but of several causes of action." Then came the case of *Sandes* v. *Wildsmith* (1) in which the Divisional Court adopted the same view as that which I have been endeavouring to express.

Under these circumstances, are the cases of the different plaintiffs cases in respect of which all the plaintiffs are entitled to sue in one action? In my view they are not, although there is a good deal of evidence which would be common to all the cases. The transaction in each case is not identical merely because all the different goods were shipped on board the same ship, or because they were all of a similar description. The different shipments were made under different contracts of carriage; and it seems to me that the case as to each plaintiff will depend on the question how far the shipowners as against him can prove that the quantities stated in his bill of lading were wrong, and the shipment at the port of loading different from that alleged in such bill of lading. The onus of proving that lies on the shipowners; but it seems to me that each case depends on the facts with regard to the particular shipment, and that it would probably promote miscarriage and confusion rather than justice to hold that all the plaintiffs who shipped at different times could join in one action. I am afraid that the joinder of all the cases in one action would lead to laxity on the part of the jury, and, instead of considering separately the case of each shipment, they would take some general view as to the whole. I cannot say that I feel much pressed by any of the suggested difficulties in the way of holding what I hold to be the necessary construction of Order XVI., r. 1. As my view of the effect of the rule diverges to some extent from that of the other members of the Court, I have thought it right somewhat fully to express that view, which I must confess I strongly entertain.

(1) [1893] 1 Q. B. 771.

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KAY, L.J. A number of persons, who shipped cotton on the same ship for a particular voyage and took separate bills of lading for their several shipments, describing the bales shipped by each by different marks, have joined in this action against the shipowners for not delivering to each of the plaintiffs the cotton shipped by him. The Divisional Court has stayed the action "on the ground that the various plaintiffs hereto should have brought separate actions in respect of their respective claims."

The first question is whether such an action can be instituted under the General Orders. Order XVI., r. 1, is one of a group headed "Parties. 1. Generally." "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment." Rule 4 of the same order in like words provides: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment." Rule 11 enables the Court or a judge at any stage of the proceedings to strike out the names of any parties improperly joined as plaintiffs or defendants.

Standing alone, I should be of opinion that, notwithstanding the use of the word "severally" in rule 1, these rules did not authorize the joining under one writ of different causes of action, either by one or more plaintiffs against one or more defendants. They relate only to parties, not to causes of action, and this seems to me made clear by rule 11. Besides, in rules 1 and 4 the same expression is used, "the right to any relief," which seems rather to point to one cause of action in which several plaintiffs or several defendants may be jointly, severally, or alternatively interested.

But then follows Order XVIII., r. 1. This order is preceded by the words "Joinder of causes of action." "Subject to the

following rules of this order, the plaintiff may unite in the same action several causes of action; but, if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." Order LXXI., r. 2: "In these rules, unless repugnant to the context, the singular number shall include the plural and the plural number shall include the singular."

Therefore "the plaintiff" in Order XVIII., r. 1, may be read "the plaintiffs" unless the context forbids. There is nothing repugnant to this in the context. Indeed, any other construction would involve the absurd consequence that, if two or more plaintiffs were suing for one cause of action, they could not join another, although one plaintiff might do so. Order XVIII., r. 1, does not say "one plaintiff" or even "a plaintiff," but "the plaintiff," which includes the plural "the plaintiffs." The latter part of the order, expressly enabling the Court or a judge to require separate trials of each cause of action, or to make such other order as may be necessary or expedient, prevents any possibility of abuse. Moreover, Order XVIII., r. 8, enables any defendant to apply to the Court or a judge to confine the action to one or more of the causes of action included in it. Order XVIII., r. 1, is substituted for s. 41 of the Common Law Procedure Act, 1852, which provided that "causes of action of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit." The words "provided they be by and against the same parties and in the same rights" are omitted in Order XVIII.; and the omission would seem to shew that under this order they need not be by or against the same parties or in the same rights.

It may be suggested that the object of Order XVIII., r. 1, is only to enable several plaintiffs, who together initiate an action under Order XVI., when such action is properly constituted under that Order, to add other causes of action. But that is not the form of Order XVIII. It reads, the plaintiffs "may unite in the same action several causes of action."

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I confess I am inclined to give the widest effect to this rule which its words permit. The object is to prevent the necessity of a number of separate actions where the matters in dispute can conveniently be tried together. If several plaintiffs were so ill-advised as to unite perfectly separate causes of action against the same or different defendants, the Court or a judge could, and doubtless would, correct this under rule 1 or 8 of Order XVIII. at the cost of such plaintiffs. But there may be several causes of action so connected that a great part of the evidence required may be common to them all, or for some other reason it may be convenient or a saving of expense to try them together; and I am inclined to hold that, according to the fair construction of these rules, they are intended to enable this to be done.

The authorities have not settled this question. In *Smith* v. *Richardson* (1) Denman, J., adopts a note from Wilson's Judicature Acts: "Order XVI., dealing with parties, assumes an ascertained subject-matter: Order XVII. (now XVIII.), dealing with subject-matter, assumes ascertained parties. There must, therefore, either be identity of subject-matter, in which case Order XVI. gives ample liberty in the choice of parties, or identity of parties, in which case Order XVII. gives a like liberty in the choice of subject-matter." Lord Selborne, in *Burstall* v. *Beyfus* (2), says that Order XVIII., r. 1, authorizes the joinder, not of several actions against distinct persons, but of several "causes of action." The case decides that a defendant against whom the plaintiff had a distinct cause of action could not be joined in an action by the plaintiff against another defendant where the separate causes of action were only historically connected.

If the cases of *Booth* v. *Briscoe* (3) and *Gort* v. *Rowney* (4) are to be read as intimating an opinion that several causes of action by different plaintiffs can be joined under Order XVI., r. 1, alone, I should with all respect differ from that opinion. But under that rule coupled with Order XVIII., r. 1, there is more reason for holding this to be possible. In *Sandes* v. *Wildsmith* (5) I do not find any reference to Order XVIII., r. 1.

(1) 4 C. P. D. 112.
(2) 26 Ch. D. 35.
(3) 2 Q. B. D. 496.
(4) 17 Q. B. D. 625.
(5) [1893] 1 Q. B. 771.

If this be the true effect of the rules, there still remains the question how the discretion given to the Court by Order XVIII., rr. 1 and 8, should be exercised in this case.

The full number of bales represented by all the bills of lading together, it seems, were not shipped. Of those actually shipped, some were landed having no marks upon them. These have been sold, and their proceeds divided among the several shippers rateably. This seems to have been done by arrangement, without prejudice to the claims of the holders of the bills of lading against the shipowners. There is, after all, a deficiency or short delivery on each bill of lading. The result would seem to be that there is a primâ facie liability to the holder of each bill of lading. It is argued that, if several actions were brought, they might be defeated in detail by saying to each plaintiff, "Your bales were among those that had no marks." But before the shipowners could be heard to say that, they must prove that some of the unmarked bales did belong to the particular shipper, and that the marks have been obliterated. Unless they could do this, the onus being entirely upon them, they could not defeat the action. However, I do not think that there will be any inconvenience, and there may be some advantage and saving of expense, in trying the several causes of action in this case together. There is a complication arising from the circumstance that the goods mentioned in each of these bills of lading were similar—that is to say, bales of cotton—that they were shipped in the same ship, and that each plaintiff is interested in the question whether the missing bales were or were not part of his shipment. It seems to me, therefore, that the best course will be to allow this action to proceed, subject always to the power of the judge under Order XVIII., r. 1, to direct separate trials, or to make such other order as may be necessary or expedient for the separate disposal thereof.

Appeal allowed.

Solicitors for plaintiffs: *Wynne, Holme, & Wynne, for Forshaw & Hawkins, Liverpool.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co.*

E. L.

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July 14.

[IN THE COURT OF APPEAL.]

BUDDEN *v.* WILKINSON.

Practice—Discovery—Affidavit of Documents—Sufficiency of Affidavit—Protection from Production.

The plaintiffs in an action of trespass, to which the defendants pleaded a right of way, filed an affidavit of documents, in which they stated that they had in their possession documents, numbered 1 to 26, tied up in a bundle marked A, and initialled by one of the deponents; that these documents related solely to the case of the plaintiffs and not to the case of the defendants, nor did they tend to support it; and the plaintiffs, therefore, alleged that the documents were privileged from production. The defendants applied for an order that the plaintiffs should file a further and better affidavit:—

Held, by the Court of Appeal, that as according to *Taylor* v. *Batten* (4 Q. B. D. 85) an affidavit is sufficient if it contains a description of documents which is sufficient to enable the Court to make and enforce an order for their production, the affidavit in the present case was sufficient.

Semble, that the documents were privileged from production, for the case was undistinguishable from *Bewicke* v. *Graham* (7 Q. B. D. 400), with which *Maclean* v. *Jones* (66 L. T. 653) was inconsistent; and that it was not necessary that the affidavit should state that the documents did not tend to impeach the plaintiffs' title.

APPEAL against an order of the Divisional Court (Mathew and Wright, JJ.) directing the plaintiffs to file a further and better affidavit of documents.

The action was for trespass to land, the defence being a right of way. The plaintiffs in their affidavit of documents, made pursuant to Order XXXI., r. 12, admitted the possession of documents relating to the matters in question in the action, being the documents which were set forth in the schedule thereto, and proceeded as follows:—

"(4.) We have also in our possession or power certain documents, numbered 1 to 26 inclusive, which are tied up in a bundle marked A, and initialled by the deponent G. S. Budden. The said documents last mentioned relate solely to the title or to the case of us the plaintiffs, and not to the case of the defendants, nor do they tend to support it; wherefore we object to produce the same and say they are privileged from production."

The defendants applied for an order directing the plaintiffs to

file a further and better affidavit of documents. On appeal from the master, who refused the application, Wills, J., allowed the appeal. The plaintiffs appealed to the Divisional Court, who dismissed the appeal, saying that they were bound by the authority of *Maclean* v. *Jones* (1), and suggesting that it would be well to bring the matter before the Court of Appeal.

Montague Lush, for the plaintiffs. The Divisional Court thought themselves bound by *Maclean* v. *Jones* (1); but *Bewicke* v. *Graham* (2) and *Bulman* v. *Young* (3) shew that a party is not bound to produce documents which relate exclusively to his own case. In Wigram on Discovery, 2nd ed. p. 243, no distinction is made between a party's title and his case as regards discovery: Bray on Discovery, 501.

[LINDLEY, L.J. You are bound by the oath of the party as to relevancy. Are you bound by his oath that the documents relate exclusively to his case?]

There is no greater hardship in one case than in the other, and in no other way can private confidential papers be protected, the inspection of which might give occasion to actions for libel. A party is not entitled to see any document which does not tend to make out his case: *Jenkins* v. *Bushby*. (4) The question in the case of title-deeds is similar to that in the case of other documents: *Attorney General* v. *Thompson*. (5) In *Greenwood* v. *Greenwood* (6) Kindersley, V.C., laid it down as an indisputable proposition that if a defendant swore that certain documents related solely to his own case and did not relate to the plaintiff's case, and contained nothing to defeat his own case, the Court would give credit to that statement, and would not order production; though in the case before him he ordered production on the ground that there was enough to lead the Court to the conclusion that the defendant's statement was not to be believed. *Mansell* v. *Feeney* (7) stands alone, and is against the current of authority. *Bulman* v. *Young* (3) is inconsistent with it, and in *Bewicke* v. *Graham* (2) it is treated as of no authority.

(1) 66 L. T. 653.
(2) 7 Q. B. D. 400.
(3) 49 L. T. 736.
(4) 35 L. J. (Ch.) 400.
(5) 8 Hare, 106.
(6) 6 W. R. 119.
(7) 2 J. & H. 320.

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In *Peile* v. *Stoddart* (1) documents were protected by the statement that the defendant was advised and verily believed that they did not contain any evidence in support of or tending to support the plaintiff's defence to an action at law brought against him by the defendant. The question now before the Court goes to the root of the rules as to discovery.

[LOPES, L.J., referred to *Attorney General* v. *Emerson* (2).]

Ever since *Bewicke* v. *Graham* (3) this form has been considered a sufficient description of documents to inform the Court as to their nature. The point as to describing the documents was never raised in the Court below; if it had been, the plaintiffs could have given a description. *Taylor* v. *Batten* (4) is in favour of the sufficiency of the affidavit. *Morris* v. *Edwards* (5) shews that it was not necessary for the petitioners to say that the documents did not impeach their own case.

J. E. Bankes, for the defendants. The affidavit must shew the nature of the documents, that the Court may form its opinion whether their nature does not shew that privilege cannot be claimed on the ground alleged. This has always been required: *Combe* v. *Corporation of London* (6); and in *Attorney General* v. *Emerson* (7) the rule there laid down is approved. *Taylor* v. *Batten* (4) turned only on the sufficiency of the description for the purposes of production. *Bewicke* v. *Graham* (3) purported to be founded on *Taylor* v. *Batten* (4), and the point as to the sufficiency of description for the purpose of seeing whether the privilege could be claimed was not raised, nor does the judgment deal with it. The affidavit is not an affidavit as to facts, but as to the construction of documents, and cannot be held sufficient.

The allegation that the documents contain nothing to impeach the case of the party in possession of them is necessary. *Morris* v. *Edwards* (5) was an action of ejectment, and it would be irrelevant for a defendant in ejectment to say that the documents do not impeach his title, for the plaintiff has to recover on the strength of his own title, and has nothing to do with defects

(1) 1 Mac. & G. 192.
(2) 10 Q. B. D. 191.
(3) 7 Q. B. D. 400.
(4) 4 Q. B. D. 85.
(5) 23 Q. B. D. 287; 15 App. Cas. 309.
(6) 1 Y. & C. Ch. 631.
(7) 10 Q. B. D. 191, 203.

in the defendant's title. *Emmerson* v. *Ind, Coope & Co.* (1) goes on the same ground. There is abundant authority for requiring the allegation in all cases except ejectment. *Boyd* v. *Petrie* (2) illustrates the principle. The necessity of the allegation is admitted in *Attorney General* v. *Emerson.* (3) The dicta on which the other side rely to shew the sufficiency of this affidavit were in cases where the documents were sufficiently described. In *Bustros* v. *White* (4) production of documents was ordered, though they were stated to relate only to the plaintiff's case and not to the defendant's case. If this affidavit is held sufficient, the rule which the Court has always followed, not to act in the dark, will be infringed.

Montague Lush, in reply. The question of the sufficiency of the description was never raised in the Court below. The points argued below were, first, whether the privilege extended to anything but documents of title, and, secondly, whether the clause that the documents did not impeach the title of the possessor of them must be inserted. *Taylor* v. *Batten* (5) defined the office of an affidavit of documents, and Cotton, L.J., there says: "But it is said that the plaintiffs are entitled to be put in such a position as to test the truth of the affidavit by the description of the documents. That, however, is in our opinion erroneous. The only object of the affidavit is to enable the Court to order the documents to be produced if it think fit to make an order to that effect, and if words are used which, if true, protect the documents, no further particularity is necessary than in the case of documents for which protection is not claimed."

[LOPES, L.J. How do you reconcile that with the observations of Lord Esher in *Attorney General* v. *Emerson*? (3)]

The points in question in the two cases were quite different, and the observations in each case must be read with regard to its subject-matter. The defendants' proper remedy here was to apply for production. In *Gardner* v. *Irvin* (6) a further affidavit was ordered because the grounds of privilege were not properly set out. Here the facts are sufficiently set out. *Ind, Coope & Co.* v.

(1) 33 Ch. D. 323.
(2) 20 L. T. 934; 17 W. R. 903.
(3) 10 Q. B. D. 191.
(4) 1 Q. B. D. 423.
(5) 4 Q. B. D. 85.
(6) 4 Ex. D. 49.

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Emmerson (1) supports the view that the allegation as to the documents not impeaching the deponent's own title is not necessary.

LINDLEY, L.J. This is an appeal from an order of the Divisional Court holding that a certain affidavit of documents is insufficient. The affidavit runs thus: "We have also in our possession or power certain documents, numbered 1 to 26 inclusive, which are tied up in a bundle marked A, and initialled by the deponent G. S. Budden. The documents last mentioned relate solely to the title or to the case of us the plaintiffs, and not to the case of the defendant, nor do they tend to support it; wherefore we object to produce the same and say they are privileged from production."

The action in which this affidavit has been sworn is an action of trespass which is met by a plea of a right of way, and the question in dispute therefore, of course, will be the right of way over the land. Possession is enough to support the plaintiffs' claim, and the possession appears not to be in dispute; but the right of way, of course, may raise a question of title.

The real point in dispute will be—I do not say is at this moment, but will be—whether the documents specified in this bundle are sufficiently protected from production, and the case has been argued as if that was the substantial question before us. There is no doubt but that it will be the substantial question; but in point of form what we have to consider now is the sufficiency of the affidavit. The question which arises therefore, is what is it necessary to set out in an affidavit of documents to make it sufficient, and upon that particular point the case of *Taylor* v. *Batten* (2) is conclusive. I am not going to read the whole of the judgment, but the principle of it is enunciated in two or three lines, which I will read. "The principle of our decision is that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it if the Court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced, is sufficient." Now, here the affidavit

(1) 12 App. Cas. 300. (2) 4 Q. B. D. 85.

states that there are certain documents, which it describes so that they are capable of being identified—they are tied up in a bundle marked A, which is initialled by the deponent Budden, and the documents inclosed in that bundle are numbered 1 to 26 inclusive. You want nothing more to identify those documents, or to enable the Court to order them to be produced, and to enforce the order if it is right so to do. Taking, therefore, that case as our guide, and there is nothing new in it, the narrow point that the affidavit is sufficient appears to us to be settled in favour of the plaintiffs' view. It is a sufficient affidavit.

That decision leaves open one or two points to which I will now allude. It is said that the affidavit is not sufficient because of the expression "certain documents"; but that does not in any way throw any doubt on the identity of the bundle. Then it is said (but this refers rather to the point about the protection from discovery) that the affidavit is insufficient because it does not say that these documents do not tend to impeach the plaintiffs' title. That is a question which will arise when the point of production is raised before the Court, to which I will allude presently. That particular point, in an action for ejectment at all events, is met by the decision of the House of Lords in *Morris* v. *Edwards* (1), and also in *Ind, Coope & Co.* v. *Emmerson* (2), which shew that the omission of those words does not affect the sufficiency of the affidavit.

Then the affidavit is also quarrelled with by reason of the word "case" being introduced. That, again, is a point which does not arise on the sufficiency of the affidavit, but on the question whether the documents are protected from production.

I might stop there, and say nothing about the right to the production of these documents for which protection is claimed; but, as we have been invited to say something about it, and I will say this, that having looked into the case of *Bewicke* v. *Graham* (3), before the Court of Appeal, I think that when the question of production is raised that case will be found to govern the point, for I cannot distinguish it from the present. That case is binding upon us whether it went too far or not, as to which I say

(1) 15 App. Cas. 309. (2) 12 App. Cas. 300.
(3) 7 Q. B. D. 400.

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nothing. *Maclean* v. *Jones* (1), in a Divisional Court, appears to us both to be quite inconsistent with that decision.

The present appeal must succeed, and I think the costs of the appeal to the Divisional Court and the costs of this appeal ought to be the plaintiffs' costs in any event.

LOPES, L.J. I am of the same opinion. The real question here, and, in fact, the only question which we have to consider, is whether this affidavit is sufficient. Now, the case of *Taylor* v. *Batten* (2) appears to be clear on that point. All that is required is that the documents in question should be sufficiently identified to enable the Court to make and enforce an order for their production. The terms of the affidavit which have been read are clearly quite sufficient to enable the Court to make and enforce such an order.

It is impossible to disguise from ourselves the fact that the real question sought to be raised, and which ultimately must be raised in this case, is whether or not the documents in question are sufficiently protected from production. It is not necessary for me to express any opinion on this subject; but the case of *Bewicke* v. *Graham* (3) seems to be directly in point and a case by which we are bound. I am unable to distinguish this case from that. I think, therefore, this appeal must be allowed, and the costs dealt with as has already been stated.

Appeal allowed.

Solicitors: *G. W. Barnard*; *W. H. Withall & Co.*

(1) 66 L. T. 653. (2) 4 Q. B. D. 85.

(3) 7 Q. B. D. 400.

H. C. J.

[IN THE COURT OF APPEAL.]

C. A.
1893
July 21.

IN RE WEARE, A SOLICITOR. IN RE THE SOLICITORS ACT, 1888.

Solicitor—Striking off the Roll—Offence not in the Character of Solicitor—Solicitors Act, 1888 (51 & 52 *Vict.* c. 65), *s.* 13.

Upon an application by the Incorporated Law Society to strike the name of a solicitor off the roll, it appeared that he had been summarily convicted of allowing houses, of which he was the landlord, to be used by the tenants as brothels:—

Held, that a solicitor may be struck off the roll for an offence which has no relation to his character as a solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence primâ facie makes a solicitor unfit to continue on the roll; but the Court has a discretion, and will inquire into the nature of the crime, and will not as a matter of course strike him off because he has been convicted; and the Court considered that in the present case the nature of the offence was such that the solicitor ought to be struck off the roll:

Held, also, that an application to the Committee of the Incorporated Law Society under the Solicitors Act, 1888, s. 13, was not a condition precedent to the application to strike the solicitor off the roll, the case being one where no report of a Master would have been necessary before the Act, and the old jurisdiction of the High Court being saved by s. 19.

APPEAL from an order of the Divisional Court (Wills and Charles, JJ.) ordering the name of E. Weare, a solicitor, to be struck off the roll.

It appeared that on August 30, 1892, Weare was convicted under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13, by two justices of Bristol for that he, being the landlord of No. 4, Harford Street, Bristol, was unlawfully and wilfully a party to the continued use of such premises as a brothel, and was sentenced to a term of imprisonment.

It was proved beyond dispute that the above house and some other houses belonging to Weare were let to weekly tenants, and had been used as brothels. The justices considered it also to be established that Weare knew all along that the premises were being so used. Upon appeal to the quarter sessions, the recorder took the same view of the evidence as the justices, and affirmed the conviction, but set aside the sentence of

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imprisonment and substituted a fine of 20*l*. Weare was ordered to pay sums of money to the justices and to the informer towards their respective costs of the appeal. These sums were paid.

On December 17, 1892, the Incorporated Law Society served Weare with notice of motion that his name might be struck off the roll of solicitors; and on May 18, 1893, the Divisional Court made an order in accordance with the notice of motion.

Weare, the appellant, in person. First, the evidence was insufficient to warrant the conviction. But supposing the offence proved, it is not an offence by a solicitor in his professional character; and there is no case where a solicitor has been struck off the roll for an offence not in any way connected with his profession: *In re Hill.* (1)

[LORD ESHER, M.R., referred to *Ex parte Brounsall.* (2)]

Secondly, the time for considering the application has not arrived, for there has been no previous investigation by the Incorporated Law Society as provided by the Solicitors Act, 1888, s. 13. Assuming that the offence has been committed, it has been sufficiently expiated by the penalty and costs.

Hollams, for the Incorporated Law Society. The jurisdiction of the Court to strike a solicitor off the roll is not confined to cases of professional misconduct, the only question being whether a person who has committed the offence charged is fit to be a solicitor: *Rex* v. *Southerton* (3); *Ex parte Brounsall.* (2) It is not contended that the conviction is conclusive: *In re Hawdone* (4). The Court will look to the degree of moral delinquency: *In re Wallace* (5); *In re King* (6); *In re Blake* (7); the test being, is the solicitor fit to remain on the roll? Sect. 19 shews that a proceeding before the Incorporated Law Society is not a condition precedent to the jurisdiction of the Court.

Weare, in reply.

LORD ESHER, M.R. I am sorry to say that in this case I cannot have any real doubt as to the facts. I think that the

(1) Law Rep. 3 Q. B. 543.
(2) 2 Cowp. 829.
(3) 6 East, 126.
(4) 9 Dowl. 970.
(5) Law Rep. 1 P. C. 283.
(6) 8 Q. B. 129.
(7) 3 E. & E. 34.

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only inference to be drawn from the evidence (to the mind of any person who will look at it calmly) is that this person has allowed himself to be the landlord of brothels, and that he has let his houses to tenants when he knew that those tenants were using them as brothels. Nor can I doubt that his doing so is a criminal offence within the statute which has been read to us. [His Lordship then shortly reviewed the evidence, and stated his opinion that it established beyond doubt that the appellant had rightly been convicted of knowingly allowing his houses to be used as brothels.]

Now, is that a criminal offence? To keep a brothel was a common law offence and indictable. The Criminal Law Amendment Act, 1885, has added a new offence, that is, where the owner of a house, not keeping a brothel himself, allows the house to be used as a brothel by his tenants. That is made an offence; and what sort of an offence is it? It is put into the same category as keeping a brothel, and is now a criminal offence. In the same statute which creates the offence there is a particular remedy given instead of the remedy by indictment before a grand jury and a common jury. As we held the other day in the Court of Appeal, where an offence is created by Act of Parliament it is a misdemeanour to commit that offence. Although doing the act is not a common law misdemeanour, it is a misdemeanour for disobedience to an Act of Parliament. But where the Act of Parliament which creates that offence enacts a particular remedy, that is the only remedy or process which can be used for the purpose of punishing that offence. This, then, was a criminal offence, that is, it was a crime, and the appellant was convicted of it, not by the ordinary process by a judge and jury, but he was convicted of it by the process indicated by the Act—by information before a magistrate. He was then convicted of a criminal offence, and has been punished for that offence. Now comes the question whether under those circumstances the Court can entertain an application to strike him off the rolls, and whether, if the Court entertains it, there is any reason to differ from what the Divisional Court has done.

It is argued that if an offence committed by a solicitor is not an offence in his character as a solicitor, or having relation to his

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character as a solicitor, then, however monstrous it may be, the Court has not authority to strike him off the rolls because the act is not done by him in his capacity as a solicitor. That would seem to me to be a very strange doctrine if it were true—that a person convicted of a crime, however horrible, must, if it be not connected with his professional character, be allowed by the Court still to be a member of a profession which ought to be free from all suspicion.

But is it a true doctrine? It seems to me that it was decided not to be so as far back as the time of Lord Mansfield in 1778, in *Re Brownsall* (1). I do not say that his decision laid down any new law, but the law is there very authoritatively laid down by him with his usual felicity of expression. It was an application to the Court to strike an attorney off the roll, he having been convicted of stealing a guinea, for which offence he received the sentence to be branded in the hand and to be confined to the House of Correction for nine months. Two things were argued: first of all, that the conviction for the offence was at least four or five years old; secondly, that he had been punished for it, and on both grounds it was said the Court ought not to strike him off the roll. Lord Mansfield says: This "application is not in the nature of a second trial" (i.e., a second trial for the offence of stealing) "or a new punishment" (i.e., for the offence of stealing). "But the question is whether, after the conduct of this man" (i.e., in stealing the guinea—it does not say when, where, or how) "it is proper that he should continue a member of a profession which should stand free from all suspicion. Suppose he had been a justice of the peace, the conviction itself would not remove him from the commission, but could there be a doubt that he ought to be struck out of the commission?" Then Lord Mansfield says: "We have consulted all the judges upon this case, and they are unanimously of opinion that the defendant's having been burnt in the hand is no objection to his being struck off the roll." That would only go to the point whether because he had been punished he could not be struck off; but he goes on to say: "And it is on this principle, that he is an unfit person to practise as an attorney."

(1) 2 Cowp. 829.

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That is the ground. "It is not by way of punishment, but the Courts on such cases exercise their discretion whether a man whom they have formerly admitted is a proper person to be continued on the roll or not." That, he says, is the question; and then he goes on to say: "Having been convicted of felony, we think the defendant is not a fit person to be an attorney." There it seems, to me, is the whole law on the matter laid down as distinctly as can be, and in a way the propriety of which nobody, as it appears to me, can doubt.

In the case of *Rex* v. *Southerton* (1) an information had been filed by the Attorney General against the defendant, an attorney, upon which he was tried and convicted at the last assizes on the fourth and subsequent counts. Now, the counts upon which he was convicted were counts alleging threats to proceed against a person before the Exchequer, alleging in fact a conspiracy to extort money by false charges. That is not an offence committed by a man in his capacity of attorney. It is an offence which any man might commit: any common informer who is not an attorney might do so. The defendant was tried for that and a verdict was given against him; but the verdict was set aside for some technical error. Still, although the offence for which he had been tried and of which he was convicted was an attempt to extort money by threats, which is not a case of professional misconduct, and although the conviction was set aside and the judgment was arrested, Lord Ellenborough said that enough appeared to the Court to satisfy them that the defendant was an improper person to remain as an attorney on the roll of the Court, and he directed the master to inquire and report upon nothing more than this, whether the defendant was still upon the roll of the attorneys of the Court; and, when the master reported that he was, the Court struck him off. There the Court seems to me to have proceeded on the very ground on which Lord Mansfield had proceeded in the former case. You have then the case of *In re Hill* (2): "An attorney acting as a clerk to a firm of attorneys, in completing the sale of certain property, received the balance of the purchase-money, which he appropriated to his own use." This was not an act

(1) 6 East, 126. (2) Law Rep. 3 Q. B. 543.

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done in his capacity as a solicitor. It was the same offence as would be committed by a merchant's clerk or by a tradesman's clerk who embezzled his master's money. Although he was authorized by his employers to receive it, his retaining it for his own use was embezzlement. He having being convicted for that, then there was a motion to strike him off the rolls, and the head-note says: "Although the misconduct was not committed strictly in his professional character" (I should say myself that the word "strictly" ought to be left out), "yet, as it was misconduct which would have prevented him from being admitted as an attorney, the Court would exercise its summary jurisdiction and punish the misconduct." Cockburn, C.J., puts the case thus: "When an attorney does that which involves dishonesty, it is for the interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as an attorney of the Court. In this case, if the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement, and upon that conviction being brought before us we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until the conviction had taken place; but here we have the person against whom this application is made admitting the facts." Blackburn, J., puts it on the same ground. He says: "I may add, in accordance with what the Lord Chief Justice has said, that, in the punishment that it would be necessary to impose upon an offender for the protection of the suitors, it always should be considered whether the particular wrong done is connected with the character of an attorney. The offence morally may not be greater, but still, if done in the character of an attorney, it is more dangerous to the suitors, and should be more severely marked." He says that if the act is done in the character of a solicitor the only difference that makes is that it should be more severely marked; and Mellor, J., says: "It would be extremely dangerous if we were to allow an immunity because the man, when the offence was done, was not acting as an attorney, but as a clerk."

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All these cases seem to me to shew that it is not necessary that the offence, at all events, if it be a criminal offence, should be committed by the offending party in his character as an attorney; the question is whether it is such an offence as makes it unfit that he should remain a member of this strictly honourable profession. Where a man has been convicted of a criminal offence, that primâ facie at all events does make him a person unfit to be a member of the honourable profession. That must not be carried to the length of saying that wherever a solicitor has been convicted of a criminal offence the Court is bound to strike him off the roll. That was argued on behalf of the Incorporated Law Society in the case of *In re a Solicitor, Ex parte Incorporated Law Society*. (1) It was there contended that where a solicitor had been convicted of a crime it followed as a matter of course that he must be struck off; but Baron Pollock and Manisty, J., held that, although his being convicted of a crime primâ facie made him liable to be struck off the roll, the Court had a discretion and must inquire into what kind of a crime it is of which he has been convicted, and the Court may punish him to a less extent than if he had not been punished in the criminal proceeding. As to striking off the roll, I have no doubt that the Court might in some cases say, "Under these circumstances we shall do no more than admonish him"; or the Court might say, "We shall do no more than admonish him and make him pay the costs of the application"; or the Court might suspend him, or the Court might strike him off the roll. The discretion of the Court in each particular case is absolute. I think the law as to the power of the Court is quite clear.

Then comes this question, whether, after the passing of the Solicitors Act of 1888, this jurisdiction can be exercised by the High Court without there having been an application to the Incorporated Law Society? That depends upon what is the true construction of the Act. That Act, in ss. 12 and 13, says that an application to strike the name of the solicitor off the roll or an application to require a solicitor to answer any allegations shall be made to and shall be heard by the committee. But then it says: "The committee, after hearing the case, shall

(1) 61 L. T. 812.

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embody their finding in the form of a report to the High Court, and then the report shall have the same effect and shall be treated by the Court in the same manner as the report of a master of the Court." That section was intended to put, and has in my opinion in effect put, the inquiry by the Incorporated Law Society in the place of a report by the master, and therefore where the case would have called for a report from the master the inquiry must be made by the Incorporated Law Society. But where no inquiry before the master would be necessary, it is absurd to say that you are to replace an unnecessary inquiry before the master (an inquiry which never would have been ordered) by an inquiry before the Incorporated Law Society, which is to have the same effect as a report by the master, where a report by the master would never have been required at all. But if there is any doubt about the point it seems to me that the 19th section preserves the jurisdiction of the High Court to act on its own motion if it thinks fit. I think therefore that it is not a condition precedent that there should be an inquiry by the Law Society, and that objection fails. Not only we have authority to act, but we are bound to act in this case. The Divisional Court, having heard the case, has come to the conclusion that this solicitor has been convicted of a criminal offence of such a disgraceful kind that he ought to be struck off the rolls. The Court is not bound to strike him off the rolls unless it considers that the criminal offence of which he has been convicted is of such a personally disgraceful character that he ought not to remain a member of that strictly honourable profession. Now, what is the offence? The offence is being a party to the use of a house belonging to him as a brothel. Is it or is it not personally disgraceful? Try it in this way. Ought any respectable solicitor to be called upon to enter into that intimate intercourse with him which is necessary between two solicitors, even though they are acting for opposite parties? In my opinion, no other solicitors ought to be called upon to enter into such relations with a person who has so conducted himself. I think he has been convicted of a personally disgraceful offence. The conviction is primâ facie a reason why the Court should act. The disgracefulness of the crime in this case is such that the

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Court was bound to strike him off the roll. I know how terrible that is. It may prevent him from acting as a solicitor for the rest of his life; but it does not necessarily do so. He is struck off the roll; but if he continues a career of honourable life for so long a time as to convince the Court that there has been a complete repentance, and a determination to persevere in honourable conduct, the Court will have the right and the power to restore him to the profession. His case, therefore, is not hopeless; but for the time he must be struck off the roll, and this appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion.

With respect to the facts, I have little to say, but that, as was said by Wills, J., it would be a stretch of charity which would degenerate into absurd and ridiculous weakness if we allowed ourselves to express a doubt as to the real facts of the case. I have not the slightest doubt whatever that this solicitor went on letting these houses knowing perfectly well for what purpose they were being used. It is idle and childish to expect any one to come to any other conclusion. That being so, the question is, what ought to be done? The appellant says that what he has done has nothing to do with his character as a solicitor—that it is not misconduct in his professional capacity. But what is the function of the Court in considering applications to strike solicitors off the rolls? It is impossible to express that function better than in the language of Lord Mansfield in the case of *Re Brounsall* (1), which was repeated and adopted with little variation in the later case of *Rex* v. *Southerton* (2). The question is, whether a man is a fit and proper person to remain on the roll of solicitors and practise as such. That is the question. Now, asking that question, how can we say that a person who acts as this man is proved to have acted is a fit and proper person to remain on the roll of solicitors? What respectable solicitor could without loss of self-respect, knowing the facts, meet him in business? And what right have we to impose upon respectable solicitors the duty of meeting him in business? I have no

(1) 2 Cowp. 829. (2) 6 East, 126.

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hesitation whatever in saying that the decision of the Divisional Court was correct, and that we cannot alter it.

With respect to the question of procedure, I take it that the conviction is equivalent to the report of a master, and that therefore, there being a conviction of a criminal offence, it is not necessary to adopt the machinery of the Act of 1888 and go before the Incorporated Law Society, and then before the Court.

I quite agree with what the Master of the Rolls has said about restoration to the roll being quite another matter.

LOPES, L.J. I feel compelled to come to the conclusion that the offence with which the solicitor is charged is amply proved, and that his conviction was right. I am also compelled to come to the conclusion that the decision of the Divisional Court was right. I desire, however, to add a few words with regard to the jurisdiction of the Court.

It has been suggested that the power to strike off the roll only exists where there has been some professional misconduct. It appears to me that to hold that the jurisdiction of the Court to strike off the roll extends only to professional misconduct and neglect of duty as a solicitor, would be placing too narrow a limit on that most salutary disciplinary power that the Court exercises over its officers. To my mind the question which the Court in cases like this ought always to put to itself is this, Is the Court, having regard to the circumstances brought before it, any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor? That appears to me to be the question which the Court always has to answer when a matter of this kind comes before it. That the jurisdiction of the Court is not confined to cases where the misconduct has been connected with the solicitor's profession to my mind is made very clear by the case of *In re Hill* (1). That case has been referred to by my Lord, but he did not read the judgment of Blackburn, J., which seems to me to put the matter as clearly as it can be put. Blackburn, J., says: "I think when we are called upon in exercise of our equitable jurisdiction to order an

(1) Law Rep. 3 Q. B. 543.

attorney to perform a contract, to pay money, or to fulfil an undertaking, there we have jurisdiction only if the undertaking or the contract is made in his character of attorney, or so connected with his character of attorney as to bring it within the power of the Court to require that their officer should behave well as an officer. But where there is a matter which would subject the person in question to a criminal proceeding, in my opinion a different principle must be applied. We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them upon the same principle as if we were considering whether or not a person is fit to become an attorney. If he has previously misconducted himself we should consider whether the circumstances were such as to prevent his being admitted, or whether he had condoned his offence by his subsequent good conduct, the principle on which the Court acts being to see that the suitors are not exposed to improper officers of the Court." Lush, J., says: "I think, where the misconduct is of such a character as would prevent a person from being admitted as an attorney, that we are bound to interfere after a person has been admitted as an attorney." Now, that case (to say nothing of the others that have been brought to the notice of the Court) places it beyond doubt that the jurisdiction of the Court extends, not only to the case where the misconduct has been connected with the profession of the solicitor, but also to cases where the conduct, though not so connected, has been such as to make it clear to the Court that that person is no longer fit to be held out as a fit and proper person to exercise the important functions with which the Court intrusts him. Now I am reluctantly compelled to come to the conclusion that the solicitor in question in the present case has brought himself within the terms of that rule, viz., that by his conduct he has shewn himself not to be a fit and proper person to be intrusted with the responsibilities and duties which belong to the profession which he has hitherto followed.

I wish to make only one observation with regard to a point that arose about the conviction. It is perfectly clear that the

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Lopes, L.J.

mere fact that the person has been convicted of a criminal offence does not make it imperative on the Court to strike him off the roll. There are criminal offences and criminal offences. For instance, one can imagine a solicitor guilty of an assault of such a disgraceful character that it would be incumbent on the Court to strike him off the roll. On the other hand, one can imagine an assault of a comparatively trifling description, where in all probability the Court would not think it its duty to interfere. The same observation would arise with regard to indictments for libel. There are libels and libels, some of which would compel the Court to act under the plenary power it possesses, others where the Court would hesitate before it so acted.

With regard to the point taken, that it was a condition precedent to the intervention of the Court that an application should be made to the Incorporated Law Society, I can only say that in my opinion that contention entirely fails. The application to the Incorporated Law Society was intended to be in substitution for the master's report. The report of the master was never necessary where the proceedings were taken upon a conviction, and therefore it is not necessary in this case. And again, if there were any doubt about that, s. 19, which preserves the jurisdiction of the Court, would be an ample answer.

Appeal dismissed.

Solicitors: *Ridsdale & Son, for Gregory & Hirst, Bristol; E. W. Williamson.*

H. C. J.

THE QUEEN *v.* WOLFERSTAN AND OTHERS. 1893 *July* 10.

Highway—Rate—Publication—Highway Parish having no Church — Notice affixed in Conspicuous Place—17 *Geo.* 2, *c.* 3, *s.* 1—5 *&* 6 *Wm.* 4, *c.* 50, *s.* 27—7 *Wm.* 4 *and* 1 *Vict. c.* 45, *s.* 2—45 *&* 46 *Vict. c.* 20, *s.* 4.

A highway rate made for a "parish" within the meaning of the Highway Act, 1835, but not being a poor-law or ecclesiastical parish, and having no church, is duly published if notice thereof is affixed in some public and conspicuous place or situation in such highway parish.

ORDER NISI to justices to shew cause why a writ of mandamus should not issue commanding them to issue their distress warrant for non-payment of a highway rate. The circumstances, as disclosed on the affidavits, were shortly as follows:—

Hurley was a hamlet which separately maintained its own highways, and was a parish within the meaning of s. 5 of the Highway Act, 1835; it was not a poor-law parish or an ecclesiastical parish; it contained no parish church or consecrated building, and only contained two places of worship, a schoolroom licensed by the bishop for the celebration of divine service, and a Wesleyan chapel. The hamlet formed part of the ecclesiastical parish of Kingsbury, the church of that parish being three miles distant. The surveyor of highways for the hamlet of Hurley duly made a rate under the Highway Act, 1835, for the purpose of carrying the Act into effect within the hamlet; and the rate was allowed by justices. Notices of the rate having been made and allowed were posted by the surveyor on the doors of the schoolroom and of the Wesleyan chapel, as being conspicuous places within the hamlet; but no notice was ever posted on the door of the parish church at Kingsbury. Thomas Watson, an occupier of lands within the hamlet, having refused to pay the rate, an application was made to justices by the surveyor for the issue of a distress warrant, but refused upon the ground that there had been no proper publication of the rate.

By 17 Geo. 2, c. 3, s. 1, churchwardens and overseers are to give or cause to be given public notice in the church of every rate for the relief of the poor, allowed by the justices of the peace, the next Sunday after the same shall have been so allowed.

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By 5 & 6 Wm. 4, c. 50 (the Highway Act, 1835), s. 27, highway rates are to be allowed and published "in the same way as poor-rates are now allowed and published."

By 7 Wm. 4 and 1 Vict. c. 45, s. 2, the oral notice of the poor-rate required by 17 Geo. 2, c. 3, is replaced by a written notice "to be affixed on or near to the doors of all the churches and chapels within such parish or place."

By 45 & 46 Vict. c. 20, s. 4, in a parish in which there is no church or chapel of the parish, a poor-rate is to be deemed duly published if notice of it has been given by affixing such notice in some public and conspicuous place or situation in the parish.

Macmorran, for the occupier, shewed cause. There was no sufficient publication of this highway rate. The Act of 1882 deals only with the publication of a poor-rate in a poor-law parish, and has no application to a highway parish; it was passed to get rid of the difficulty created by the decision in *Reg.* v. *Dyott* (1), where it was held that publication could not be dispensed with in an extra-parochial place having no church, which had been made a parish by legislation subsequent to 17 Geo. 2, c. 3. That the Act does not apply to a highway parish is further shewn by s. 5 of the Interpretation Act, 1889, in which "parish" is defined as meaning, in the absence of an intention to the contrary, "a place for which a separate poor-rate is or can be made, or for which a separate overseer is or can be appointed." The Act of 1882 being inapplicable to highway rates, such rates must therefore be published in the same way that poor-rates were necessarily published before that Act was passed—viz., by publication on the church door. [He also cited *Bird* v. *Adcock*. (2)]

Alexander Glen, in support of the rule. The publication was good. The expression "parish or place" in 7 Wm. 4 and 1 Vict. c. 45, s. 2, means parish, being a parish, or place, not being a parish; it cannot be restricted to a poor-law or ecclesiastical parish: *Reg.* v. *Marriott*. (3)

[He was stopped by the Court.]

(1) 9 Q. B. D. 47. (2) 26 W. R. 634.

(3) 12 A. & E. 779.

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CAVE, J. I am of opinion that the publication of this rate was perfectly good, and that the order for the writ of mandamus must be made absolute. The publication of a highway rate is dealt with by s. 27 of the Highway Act, 1835, and that section does not require publication as the poor-rate for the particular place or parish is published, but merely as poor-rates are published. Taking this hamlet of Hurley as the place, how would the poor-rate be published? At the time of the passing of the Highway Act there would have been a difficulty, there being no parish church in the hamlet; but that difficulty in the case of the publication of a poor-rate has been met by the provisions of s. 4 of 45 & 46 Vict. c. 20, an Act that was passed in consequence of the decision in *Reg.* v. *Dyott.* (1) Before that Act there could be no valid publication of a poor-rate in a place where there was no parish church; and it was therefore enacted that where there was no church the rate might be published by affixing a notice in some convenient and conspicuous spot. This was a common-sense way out of the difficulty. The legislature might, indeed, have said that where there was no church in the place the publication should be on the door of the nearest church, or of the church of the adjoining parish; they did not do so, however, but dispensed with the necessity for publication on a church at all, and substituted publication in a conspicuous place. The object of publication of a rate is to give notice of its making and allowance to persons affected by it, and who may desire to appeal against it; and publication on a conspicuous place in the place where the people live is a simple and rational way of effecting that object; to require that the publication should take place on the door of a parish church that the people do not frequent would not be nearly so good a mode of making them acquainted with it. If it were possible that a poor-rate should be made for the highway parish of Hurley, the case would come within the recent statute, and publication in a conspicuous place would be sufficient; but what is wanted is to publish a highway rate for that highway parish, and, in my judgment, publication in a conspicuous place satisfies the language of the statute and is in entire accordance

(1) 9 Q. B. D. 47.

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with its intention. I think, therefore, that this rate must be enforced.

WRIGHT, J. I am of the same opinion. It is a strong point against the contention on behalf of the occupier that, if he is right, a highway rate for Hurley must be published by oral notice in the parish church of Kingsbury. No doubt it is a strong thing to strike the word "now" out of s. 27 of the Highway Act; perhaps, however, that word may be fairly interpreted as meaning "for the time being," and in any event to strike it out altogether is less inconvenient than to hold that the only sufficient publication of this highway rate is by oral announcement in church.

Order absolute.

Solicitors for Watson: *Andrew, Wood & Co., for Dewes, Birmingham.*

Solicitors for applicant: *F. J. & G. J. Braikenridge, for Nevill & Atkins, Tamworth.*

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[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF THE ST. GILES BOARD OF WORKS AND OTHERS *v.* LONDON COUNTY COUNCIL.

Local Government—Alteration of Parish by County Council—Transfer of part of a Parish to another Parish—Power to amend Local and Personal Acts—Act partly Public and General and partly Local and Personal—Amendment of Local and Personal part of Act—Prohibition—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), *s.* 57, *sub-ss.* 1, 6; *s.* 59, *sub-s.* 6.

Under 9 Anne, c. 22, and 10 Anne, c. 11, land in the parish of St. Pancras, London, was purchased as a burial-ground for the parish of St. George, Bloomsbury, and, on consecration, became part of the latter parish. By an Order in Council burials were discontinued in the burial-ground, and the parish of St. Pancras subsequently applied to the London County Council, under the Local Government Act, 1888, s. 57, for an order transferring the burial-ground from the parish of St. George, Bloomsbury, to the parish of St. Pancras, and the council gave notice of their intention to hold an inquiry under the Act. On an application for a prohibition to the council:—

Held (affirming the judgment of the Divisional Court), that the power of the county council to amend, by scheme or order, any local or personal Act extends to the amendment of any portion of an Act, whether public and general or local

and personal, provided the portion amended is of a local and personal nature; that the clauses of the statutes of Anne which related to the burial-ground were of a local and personal nature; and that, consequently, the county council had authority to entertain the proposal and make an order.

Quære, whether prohibition would lie in such a case.

APPEAL from an order of the Divisional Court discharging an order nisi for a prohibition.

The prosecutors were the board of works for the district of St. Giles and the vestry of St. George, Bloomsbury, which parish is included in the district of St. Giles, and they obtained an order nisi for a prohibition to the London County Council to prohibit them from further proceeding to hear and determine a proposal and from making an order to transfer to the parish of St. Pancras, in the county of London, certain portions of the parish of St. George, Bloomsbury.

The lands which it was sought to transfer became part of the parish of St. George, Bloomsbury, under the following circumstances:—

In 1710 an Act was passed (9 Anne, c. 22) for granting to Her Majesty several duties upon coals for the purpose of building fifty new churches in and about the cities of London and Westminster and the suburbs thereof, and for other purposes. The duty was charged for all sorts of coal and culm imported into the port of the City of London, and the money was to be paid into the Exchequer and appropriated for the building of fifty new churches, and for purchasing sites of churches and churchyards and burial places in or near the cities of London and Westminster or the suburbs thereof, for repairing churches and chapels already built, for purchasing houses for the ministers, for applying 4000*l.* a year to repairing the collegiate church of St. Peter, Westminster, and 6000*l.* a year towards finishing Greenwich Hospital. To this end commissioners were to be nominated who were to execute the Act, and money might be borrowed by the Exchequer on the security of the Act.

By an amending Act (10 Anne, c. 11), the time limited by the former Act was extended, and it was provided that the commissioners should be authorized and empowered to purchase messuages and lands for the new churches, and for churchyards

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or cemeteries for the burial of the dead. By s. 3 the lands so to be purchased were to be conveyed to the commissioners, who should cause such churchyards and cemeteries to be made and enclosed. By s. 4, wherever the commissioners should purchase ground for cemeteries for any of the intended new parishes without the bounds and limits of such new parishes, the ground so purchased for that use should for ever after the purchasing and consecrating thereof be deemed and taken to be part of the parish for the use of which it should be so purchased and consecrated, and should be for ever discharged from any rates or taxes to the other parish out of which it should be so taken. The Act contained a number of provisions as to the making and future government of new parishes.

By 3 Geo. 2, c. 19, which recited the two statutes already noticed and a number of intermediate statutes, the parish of St. George, Bloomsbury, was constituted, and by s. 4 the commissioners were to appoint and assign a cemetery or churchyard for such new parish, which when so assigned and appointed should be deemed to be the cemetery or churchyard of such parish, according to the intention of 9 Anne, c. 22, and 10 Anne, c. 11.

The Commissioners accordingly purchased land in the parish of St. Pancras as a cemetery for the parish of St. George, Bloomsbury. The land was duly conveyed to them, and the burial-ground of the parish of St. George, Bloomsbury, was laid out and consecrated on January 28, 1730. It continued in use till April 1, 1853, when by an Order in Council, made under 15 & 16 Vict. c. 85, burials within it were discontinued subject to certain exceptions. On December 31, 1884, it was demised by the rector of St. George, Bloomsbury, to the vestry of St. Pancras, for a term of 999 years, at a nominal rent, to be used as an open space, and it has ever since been in the possession of the vestry of St. Pancras, and has been laid out and used as an open space.

On June 20, 1892, the vestry of St. Pancras applied to the London County Council for an order transferring the burial-ground from the jurisdiction of the parish of St. George, Bloomsbury, to the parish of St. Pancras, under s. 57 of the Local Government Act, 1888.

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On February 8, 1893, the county council gave notice of their intention to hold an inquiry under the section.

The ground on which the order nisi for a prohibition to the London County Council was obtained was that 9 Anne, c. 22, and 10 Anne, c. 11, under which the burial-ground was to remain for ever part of the parish, for the use of which it was purchased and consecrated, were not local and personal Acts, and could not therefore be amended by any order of the county council. (1)

On argument the Court (Day and Wright, JJ.) discharged the rule on the ground that the Acts or the parts which it was desired to amend were local and personal.

The prosecutors appealed.

Poland, Q.C., and *A. Macmorran*, in support of the appeal. The Acts of Anne were passed before the definitions of Acts as local and personal came into force, and that definition cannot apply to them. Further, they relate to raising revenue for the Crown, though the money when raised is to be devoted to a special purpose. The tax authorized affects every one bringing coal into the port of London, and, therefore, has much more than a local application, and the declared objects of the Act, the spiritual welfare of Her Majesty's subject and the benefit of the Church as by law established, are general. So also are provisions relating to Westminister Abbey and Greenwich Hospital, both of them matters of general interest. The Metropolitan Police Acts, though local in their operation, have been held to be public general Acts: *Barnett* v. *Cox*. (2) Then also the commissioners

(1) By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57: "(1.) Whenever a county council is satisfied that a primâ facie case is made out . . . . as respects any parish, for a proposal for . . . . the transfer of part of a parish to another parish . . . . the county council may cause such inquiry to be made in the locality, and such notice to be given . . . . as they think fit, and if satisfied that such proposal is desirable, may make an order for the same accordingly."

"(6.) An order under this section, when confirmed by the Local Government Board, shall be forthwith laid upon the table of both Houses of Parliament. . . ."

By s. 59: "(6.) Where a provision of this Act respecting a scheme or order requires the scheme or order to be laid before Parliament, or to be confirmed by Parliament, either in every case or if it is petitioned against, such scheme or order may amend any local and personal Act."

(2) 9 Q. B. 617.

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might buy land anywhere for a cemetery for this parish, and were not restricted to any particular place. The fact that this power is exercised locally does not affect the question, as the position at the time the Act was passed has to be considered. As to the user of the cemetery, any one dying in the parish, whether a parishioner or not, would have a right to be buried there. *Shepherd* v. *Sharp* (1) was a case which arose with regard to Ramsgate Harbour, and the decision related to statutes already classed as local and personal.

R. D. Acland, (*English Harrison*, with him), for the defendants. The Acts of Anne are not ordinary Revenue Acts; but if they were, that would not be conclusive. The tax authorized is an impost on a particular article brought into a particular port. An Act of Parliament may be general in part and particular in other part: *Ingram* v. *Foot* (2) and *Anonymous*. (3) An Act to be local and personal must be local as being confined to local limits, personal as affecting particular descriptions of persons only, as distinguished from all the Queen's subjects: *Richards* v. *Easto*. (4) In this case the area is perhaps undetermined and may be large, but the decision in *Shepherd* v. *Sharp* (1) is in point. The Acts only apply, so far as this particular property is concerned, to persons who live in the parish of St. George, or who die either resident in or parishioners of that parish. The persons affected by the taxing powers of the Acts are only a limited body who have done something to bring themselves within the Act, as in *Brett* v. *Beales* (5), where the power given was to levy toll on such as should use the navigation, and the Act was held by Lord Tenterden not to be public. It is true when these Acts were passed the present classification did not exist; but the only effect of that fact is that the nature of the Act must be looked at to see under which category it now comes.

J. Cumberland Jones, appeared for the parish of St. Pancras.

Poland, *Q.C.*, in reply.

LORD ESHER, M.R. The substance of the matter is this. The county council have been asked to entertain an inquiry and make

(1) 25 L. J. (Ex.) 254.
(2) 12 Mod. 611.
(3) 12 Mod. 249.
(4) 15 M. & W. 244.
(5) 1 Mood. & M. 416.

an order transferring certain land from the parish of St. George, Bloomsbury, to the parish of St. Pancras, and they have entertained the question, and either have made, or are about to make, an order. A rule nisi for a prohibition was obtained, which on argument was set aside, and on this there is an appeal to this Court.

I have very considerable doubt whether prohibition is the right remedy if the county council have no power to make the order, and whether they are such a body as ought to be prohibited in such a case. That however becomes immaterial if we are of opinion that the question of their right to proceed in the matter is raised with regard to an Act of Parliament that is local and personal. If the question is raised in respect of such an Act, there is no doubt that the county council have power to deal with the matter under the Local Government Act, 1888, so that the substantial question is whether we are of opinion that the Acts which it is sought to amend are local and personal Acts, within the meaning of s. 59 of the Local Government Act, 1888. The Acts on which the question arises are 9 Anne, c. 22, and 10 Anne, c. 11. It is said that both Acts are public Acts and that neither is of a local and personal nature, and, considering the subject-matter of the Acts, that they deal with the building of fifty new churches in and about the metropolis, and the adapting of these and other churches and chapels for the requirements of public service, and that they deal with the purchasing of houses for the habitation of the ministers and with matters that to my mind are clearly public objects, namely, the maintenance of Westminster Abbey and Greenwich Hospital, I can have no doubt but that, taking the Acts as a whole, they are of a public character. Taking their main object, it would appear to be for the welfare of the whole kingdom, and they cannot be said to be local and personal in their nature. But that does not solve the whole question, because though the main object of the Act may be of a public nature there may be parts of them which are of a local and personal nature, and, if so, I think that the county council would have power under sub-s. 6 to amend such parts. Considering the matter now in dispute, we find in the Acts that power is

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given to purchase land for a cemetery in a parish other than that for which a cemetery is required, and such land when purchased and consecrated is to be taken to be part of the parish for the use of which it is purchased. In determining whether that part of the Acts is local and personal we have to find out what is the meaning of that expression, and if we find that a Court has given a definition of the phrase "local and personal" when used in an Act of Parliament, we should not be anxious to differ from such definition even if we thought we could give a better one. Such a definition we find in the case of *Richards* v. *Easto*. (1) From the judgment of Parke, B., it appears that the words to be considered were, "so much of any clause or provision in any Act or Acts commonly called public local and personal, or local and personal, or in any Acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be repeated." The judgment continues: "The Act 14 Geo. 3, c. 78, was not an Act commonly called public local and personal, for that designation did not take place till long after the statute passed. On May 1, 1797, the House of Lords resolved that the King's printer should class the general statutes and special, the public local, and private, in separate volumes; and on May 8, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes and the 'public local and personal' in each session should be classed in separate volumes. The question, however, is whether the Act does not fall under the description of an Act of a local and personal nature. It seems singular that the new Act, 7 & 8 Vict. c. 84, should not be classed amongst public local and personal Acts, for it is confined in its operation to the district in and about the metropolis, with power to Her Majesty to extend its limits. How this has happened cannot be explained, for it is clearly of a local and personal nature." Then there is the definition which describes it as "local, as being confined to local limits; personal, as affecting particular descriptions of persons only, as distinguished

(1) 15 M. & W. 244.

from all the Queen's subjects." It seems to me that that is the best definition that could be proposed, and acting only on that case I should be prepared to adopt it. But the matter was before the Exchequer Chamber in *Shepherd* v. *Sharp* (1), who considered the case, and to my mind adopted the definition laid down, though I do not say they did so in terms. These are strong authorities in favour of the definition, and if it is a good one the latter part of the 4th section of 10 Anne, c. 11, comes within it. The enactment of that part of the statute is local as to place, for it is manifest to my mind that land at that time could only be bought for use as a cemetery within a limited range and distance from the parish for which it was bought. It was personal as applying to such part only of the Queen's subjects as should happen to die within the particular parish as distinguished from the rest of the Queen's subjects. The question whether the money is to be raised from all or from a portion only of the Queen's subjects is to my mind immaterial in the solution of the point before us.

Under these circumstances, I think the enactment which it is proposed to amend is of a local and personal nature within the meaning of sub-s. 6 of s. 59 of the Local Government Act, 1888, and that the county council have power to make the amendment which they have been asked to make, and therefore this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The county council are proposing to inquire, under s. 57 of the Local Government Act of 1888, into a matter which, if it is determined in one way by them, would result in the amendment or alteration of a right or a parochial declaration under s. 4 of the Act 10 Anne, and it is objected that, in doing so, they were going beyond the powers of the Act of 1888, which limits them by their scheme or order to amendments of local and personal Acts. That raises the question whether s. 4 of the Act of 10 Anne, read by the light of the previous Act of 9 Anne, is a local and personal portion of an Act; for there can be no doubt but that s. 6 of s. 59 of the Act of 1888 confines the county council to

(1) 25 L. J. (Ex.) 254.

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altering any section of an Act which is of a local and personal kind.

The history of the nomenclature of Acts of Parliament is given in two books, which are valuable for the purpose of reference. One is Clifford on the History of Private Bill Legislation, p. 268; and the second is by Mr. Hardcastle. I am not going through the history of this nomenclature; but it is important to remark that it has altered very much, and that part of the obscurity which has been introduced into the subject is due to the alterations which have been made at different times. There was a time when public and general Acts were distinguished from private and special; but that is not the division which has obtained in later times, and the more modern division has been between general Acts and local and personal; for it is to be observed (and this is essential for recollecting the point of our decision in the present instance), that "general," and not "public," is opposed to "local and personal"; and the division, therefore, lies between public and general Acts on the one side, and public local and personal Acts on the other; because, of course, a local and personal Act may be public without losing its character of local and personal.

The question, therefore, really is, not so much whether this section, or the Act of Parliament to which it belongs, is a public Act, but whether it is a public and general Act. Is it a general Act, or is it a local and personal Act?

Now, a general Act, primâ facie, is that which applies to the whole community. In the natural meaning of the term it means an Act of Parliament which is unlimited both in its area and, as regards the individual, in its effects; and as opposed to that you get statutes which may well be public because of the importance of the subjects with which they deal and their general interest to the community, but which are limited in respect of area—a limitation which makes them local—or limited in respect of individuals or persons—a limitation which makes them personal.

The statutes of the 9th and 10th of Anne certainly deal with matters of public importance and objects which certainly affect the community at large; but that only goes to shew that the

Acts are public, and does not solve the question which we have to decide. We still have to ask ourselves whether they are general Acts, or whether they are local and personal.

The statutes raised revenue for the Crown by taxing coals which were brought into the port of London. The revenue when raised was to be devoted to various objects—the building of fifty churches, the purchasing of burial-grounds, the building of Greenwich Hospital, and the repair of Westminster Abbey; and, whatever may be said as to the churches that are to be built all over the metropolis, as regards Westminster Abbey, I think—and I am sure as regards Greenwich Hospital—the importance of the subject in the interests of the community is such as to make those Acts a species of public legislation. It remains to be considered, as I said before, whether it is local and personal legislation. When we come to s. 4 of the second Act, which provides that the pieces of land which are purchased as cemeteries for the intended new parishes beyond the bounds and limits of those parishes are to be deemed and taken to be part of the parish for the use of which they are purchased, it seems to me that the inquiry answers itself. It cannot be said that that part of that Act is anything except local—that is to say, it is confined to a limited area, and not general as regards space—or that it is anything except personal in the sense that it affects the rights of individual persons or corporations in a given place. It does not extend to the rights of all Her Majesty's subjects, and is therefore unquestionably to my mind local and personal legislation. It may interest the public, but none the less is it local and personal.

Now, that being the view I take, is there anything in the cases that will support it? In the first place, we have the decision in *Richards* v. *Easto* (1), which proceeds exactly on those lines as regards the definition of local and personal legislation. *Shepherd* v. *Sharp* (2) is a decision of the Exchequer Chamber which follows the same lines, and by the latter decision we are bound: not that it requires any strong inducement to bind me and make me follow a line of thought which seems to me to be the only rational one. It has never been decided that Acts which

(1) 15 M. & W. 244. (2) 25 L. J. (Ex.) 254.

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deal solely with localities are other than local and personal Acts, except possibly in the case of *Barnett* v. *Cox* (1), in which the Court of Queen's Bench seems to have thought that the Metropolis Police Act was not a local and personal Act. That decision did not find favour with the Court of Exchequer in the case of *Moore* v. *Shepherd* (2), and was discussed by the Exchequer Chamber in *Shepherd* v. *Sharp*. (3) In the latter case it is pointed out that if the Metropolis Police Act and Acts of that class are not local and personal, it is because they affect the administration of law and justice, and therefore they are not local, because, although the mere place where justice is administered may be localized, the administration of justice touches the whole of the community, and they are not personal, because although the administration of justice may be concerned with the individual, yet really it affects the whole of the Queen's subjects. All Acts which deal with the administration of justice differ in toto from the class of local and personal Acts. They are not limited in the true sense either as regards place or persons. Therefore it seems to me that the decision we have arrived at is sound in principle and supported by authority.

It does not require much authority to shew that when the legislature speaks of amending any local or personal Act its language is to be applied to portions of Acts which are local and personal just as much as to an Act which is entirely of that nature. The question is not in such a case whether the entire statute is local and personal, but whether the portion of the statute which is proposed to be amended is so. This is a matter of common sense, because clauses of various kinds are frequently introduced into an omnibus bill which also deals with matters which are not local and personal. It would be irrational to impose any other interpretation upon sub-s. 6 of s. 59 of the Act of 1888. If authority is needed for that, there is the authority of *Ingram* v. *Foot* (4), and the *Anonymous Case* (5) in the same volume, derived from a series of reports which one is not always

(1) 9 Q. B. 617.
(2) 24 L. J. (Ex.) 28.
(3) 25 L. J. (Ex.) 254.
(4) 12 Mod. 611.
(5) 12 Mod. 249.

ready to rely upon, but which in this instance seem to be good authorities.

As to the question of prohibition, I agree with my Lord. I think there is some serious doubt whether prohibition lies in this matter—a doubt which occurred to Wright, J., and, as my Lord has said, if we had to decide that question it would be necessary to take further time to consider it.

KAY, L.J. I have come to the same conclusion. It appears from Mr. Hardcastle's book that the formal distinction which is now made between public general Acts and local and personal Acts was first adopted or commenced in the year 1797, whereas these Acts of Anne were passed in the year 1710. The rule then existing was that which was laid down by Holt, L.C.J., in the case of *Ingram* v. *Foot* (1), and the *Anonymous Case* (2) in the same reports, namely, that whether the Act was local and personal must be determined from the provisions of the statute which is under consideration, and, further, that although some parts of an Act of Parliament may be public and general, yet other parts of the same Act of Parliament may be local and personal. It is not in the least necessary in this case to consider whether the whole of this Act, or these Acts of Anne, are public and general. If that part with which we now have to deal comes within the definition of local and personal, then it seems clear, according to those decisions, that it may be dealt with by being amended by the County Council in this particular under the provisions of the Local Government Act of 1888.

It has been argued that, looking at the whole of those statutes of Anne, they provide—of course, I am only giving a general description of them—that a tax may be imposed by the Crown upon all coals which are brought to London, and that tax is to be paid into the Exchequer, and then it is to be applied, by the Crown first of all, for the purpose of building some fifty churches, either in or in the immediate neighbourhood of London and Westminster, and also for adding to those churches proper burial-grounds and cemeteries for the use of the parishes in which the churches are built. It is said that, looking at all

(1) 12 Mod. 611. (2) 12 Mod. 249.

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those provisions, taking them altogether, this Act must be considered a public and general Act, more especially because you find that the purposes for which this tax on coal is to be used are not confined to those which I have described, but besides that some portion of the income to be raised may be applied to the building of a part of Greenwich Hospital, and certain repairs which were then going on in Westminster Abbey. The application of the funds to be raised in this way for the purpose of building or repairing Greenwich Hospital, at all events, if not Westminster Abbey, may be said to be a public and general purpose. Greenwich Hospital is used as a home for seamen who have been employed in the service of the nation, and one cannot very well conceive a more public purpose than an institution of that kind is intended to fulfil. But then, does it follow that the building of churches in and near London and Westminster, and the providing of cemeteries and burial-grounds for them, is also a public purpose? I put in the course of the argument this illustration. Suppose that the purpose of this tax had been limited to the building of a particular church in one particular parish, and to providing a burial-ground for that church, could it be said that that was other than a local purpose? It seems to me to be quite impossible; and it does not make the enactment less local that the locality is larger, and that fifty churches are to be provided within the locality which the Act of Parliament itself defines. Then it is said that the particular locality of the churchyards or burial-grounds is not confined to the metropolis. It may be outside the parish of the church to which it is intended to be an adjunct, and it was suggested it might be in any part of England; but, as the Master of the Rolls has pointed out, these Acts were passed long before the days of railways. It is impossible to suppose that it was contemplated by the framers of this Act that the churchyard to be provided for a London church should be at any considerable distance from the parish for which that churchyard was intended. Therefore I think that that argument fails, and that the providing of a churchyard for one of these newly-built churches was as strictly a local purpose as the providing of the church itself. I therefore think that these

provisions of the Act of Parliament are at least local. May they not also be said to be personal? It is said, No, because all the world may resort to a particular church, and if any one happens to die in that particular parish he may be buried in that particular churchyard. That may be said of any local object, and it seems to me to be very well answered by the observation which was made in the judgment in the case of *Shepherd* v. *Sharp* (1) in a comment on the case of *Richards* v. *Easto*. (2) The comment is this: "In *Richards* v. *Easto* the 14 Geo. 3, c. 73 (the Metropolitan Buildings Act), was held to be local and personal in its nature, and yet the number of persons and the magnitude of the interests affected by it very far exceeded those affected by the statute now under consideration," which was a statute relating to Ramsgate Harbour.

Upon the whole it seems to me that this is, so far as it relates to the churchyard, a local and personal provision in an Act which may or may not have other objects which are of a public and general nature.

I also agree that it is not expedient now to express any confident opinion upon the question whether this is a proper subject for prohibition. But even if the board which is referred to in this Act of Parliament were exceeding their jurisdiction, I confess I have very considerable hesitation about it, because it seems to me very doubtful whether the Local Government Board or the county council would be, under the Local Government Act of 1888, exercising any judicial function in determining whether the churchyard which is now disused shall be considered as part of one parish or another parish.

For these reasons, I think that the judgment of the Court below ought to be affirmed, and the appeal dismissed.

Appeal dismissed.

Solicitor for prosecutors: *H. C. Jones.*
Solicitor for London County Council: *W. A. Blaxland.*
Solicitors for parish of St. Pancras: *Cunliffes & Davenport.*

(1) 25 L. J. (Ex.) 254. (2) 15 M. & W. 244.

A. M.

1893
July 10, 17.

MAYOR, &c., OF SOUTHPORT *v.* ORMSKIRK UNION ASSESSMENT COMMITTEE.

Poor-Rate—Occupation—Exclusive Use—Gas Mains.

By s. 43 of the Southport Improvement Act, 1871 (34 & 35 Vict. c. cxl.), the local board of Birkdale had the exclusive right of laying down gas mains and pipes within the township, and were obliged to keep all present and future gas mains and public lamps in good repair, and were to afford the corporation of Southport (who were the owners and occupiers of gasworks and were empowered by statute to supply gas in the township of Birkdale) the use of the same for the supply of gas for public and private purposes within the township in consideration of certain payments to be made by the corporation to the local board for every thousand cubic feet of gas supplied to private consumers. The local board had laid mains within the township and had kept them in repair, and had afforded the corporation the use of the same for the supply of gas; the mains were not used for any purpose other than the supply of gas by the corporation. The corporation laid the service pipes from the mains to the premises of private consumers at the cost of the latter, kept the service pipes in repair, and charged and collected all gas rents :—

Held, that the corporation had only a right to the use of the mains for the sole purpose of the supply of gas, and had no exclusive occupation of the mains so as to render them liable to be rated in respect of them.

Special case stated by consent under 12 & 13 Vict. c. 45, s. 11, upon appeal to quarter sessions against a poor-rate, from which the following facts appeared.

The appellants were the corporation of the borough of Southport in the county of Lancaster, and the respondents were the assessment committee of the Ormskirk Union (which comprised the township of Birkdale) in the same county and the overseers of the poor of the township of Birkdale. The appellants were the owners and occupiers of gasworks in the borough of Southport, and were empowered by statute to supply gas in the township of Birkdale.

By s. 43 of the Southport Improvement Act, 1871 (34 & 35 Vict. c. cxl.), the local board of the township of Birkdale "shall have the exclusive right, except as hereinafter provided, of laying gas mains and pipes within the township, and shall forever hereafter keep their present and future gas mains and the public lamps in the township in good repair and condition, and shall

afford the corporation [of Southport] the use of the same for the supply of gas for public and private purposes within the township, and in consideration thereof the corporation shall pay to the local board $4\frac{1}{2}d.$ for every thousand cubic feet of gas supplied by the corporation to private consumers within the township; and in consideration of the power conferred by this Act upon the corporation to supply gas within the township the corporation shall also pay to the local board $3\frac{1}{2}d.$ for every thousand cubic feet of gas supplied by the corporation within the township to private consumers, such respective payments to be made quarterly."

The local board of Birkdale had accordingly laid gas mains and pipes within the township, and kept them in good repair and condition, and afforded the corporation of Southport the use of the same for the supply of gas within the township in pursuance of and in accordance with the provisions of the said Act. The mains were not as a fact used for any purpose other than that for which they were used by the appellants.

By s. 3 of the Southport Improvement Act, 1876 (39 & 40 Vict. c. cxxvii.), it was enacted (inter alia) as follows: "The Gasworks Clauses Act, 1847 . . . are hereby incorporated with this Act . . . provided always that clauses 6 to 12 inclusive of the Gasworks Act, 1847, shall be put in force within the township of Birkdale by the Birkdale Local Board only and not by the corporation, and the word 'undertakers' in clauses 6 to 12 and 19 to 29 inclusive of the same Act shall, so far as such clauses affect the township of Birkdale, apply to and mean the Birkdale Local Board and not the corporation." The appellants had up to the present time made the service connections with the mains. Except for the public lamps in the township, they provided and laid the service pipes from the mains to the premises of the consumers, the cost of such connection and pipes being paid by the consumers, and the appellants kept all the service pipes in repair, and also charged and collected all gas rents.

On June 23, 1892, the appellants were assessed or rated as occupiers of the gas mains and pipes in the township of Birkdale.

The respondents contended that the appellants were the

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occupiers of and were rateable to the poor-rate in respect of the gas mains and pipes in the township of Birkdale; the appellants contended that they were not the occupiers of the mains and pipes, but had a mere easement or right of enjoyment in respect thereof by virtue of the section in their local Act, and that they were not assessable or rateable to the poor-rate in respect thereof. If the Court was of opinion that the appellants were not the occupiers of the gas mains and pipes, and were not rateable in respect of them, judgment was to be for the appellants. (1)

July 10. *Leese, Q.C.*, and *S. T. Evans*, for the appellants. The corporation of Southport have not exclusive occupation of the gas mains, and are not rateable in respect of them. Under the incorporated sections of the Gasworks Clauses Act, 1847, the local board of Birkdale alone has the power to break up and reinstate the streets, and to lay down, repair, and alter the gas mains and pipes, and these powers are incidents of occupation and ownership.

[CAVE, J. The obligation on the local board to repair does not prevent the corporation being the occupiers of the pipes.]

No; but these powers and obligations emphasize and explain the provisions of s. 43 of the local Act. Under that section the corporation has only a right to the use of the pipes for the purpose of the supply of gas, while the local board has such control over the pipes as would make them in law the occupiers, although for the purposes of this case it is unnecessary to shew that they are. Exclusive enjoyment is not necessarily the same as exclusive occupation: *Smith* v. *Lambeth Assessment Committee* (2), where Baggallay, L.J., says, at p. 330: "I do not propose to go through the authorities; their result may be summed up in the following terms: where an exclusive occupation is conferred, the grantee becomes rateable; but, where merely a right to an exclusive enjoyment passes, the grantee takes no interest which renders him liable to be rated."

(1) The case also raised the question of the correct method of arriving at the gross estimated rental of the gas mains and pipes, if the Court should be of opinion that the appellants were rateable in respect of them; but the decision of the Court renders it unnecessary to set out that part of the case in this report.

(2) 10 Q. B. D. 327.

[CAVE, J. That was the case of a chattel. The appellants were not the occupiers of the bookstall, for during a considerable portion of each twenty-four hours they could not approach it; they had exclusive enjoyment of it, but not of the ground on which it stood, which alone was rateable. Here it is the gas-pipes which are rateable, and the suggestion is that in their case exclusive enjoyment is equivalent to exclusive occupation.]

That must depend upon the nature of the interest given to the appellants by the statute. In *Paris and New York Telegraph Company* v. *Penzance Union* (1), it was held that a covenant of the Postmaster-General to keep special wires for the exclusive use of a telegraph company did not give the company such an exclusive occupation as to make them rateable even in a parish where the special wires were the only wires fixed to the posts. The true construction of s. 43 is that under it the corporation has a mere easement to be permitted to send gas through the pipes; this is the only right with which the local board has parted; they retain all others, including the right to sue for trespass to the mains.

[*Allan* v. *Overseers of Liverpool* (2) was also referred to.]

A. T. Lawrence, for the respondents. In determining the question of rateability it is necessary to look at the substance of the thing to be rated, not at that which is a mere accessory. Here the supply of gas through the earth is the substance; the pipe is a mere accessory, because of the necessity of a defined channel through which the gas shall pass. The corporation is bound under the statute to supply gas on the written request of a person requiring it; and gas, which is the property of the corporation, is always in the pipes; they occupy the pipes by that description of property, gas. The gas takes up the whole space in the pipes; the corporation has permanent use of the pipes night and day, and so are the occupiers of the hollow space in the earth through which the pipes pass. The expression "shall afford the use," in s. 43, does not preclude the idea of occupation by the corporation. The case is precisely analogous to that of the occupier of a house of which the landlord does the repairs. In cases where a person has been held not rateable, the decision

(1) 12 Q. B. D. 552. (2) Law Rep. 9 Q. B. 180.

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has proceeded on the ground that there was no particular piece of property to the exclusive enjoyment of which he was entitled; e.g., in *Paris and New York Telegraph Co.* v. *Penzance Union* (1) there was no specific wire; and in *Smith* v. *Lambeth Assessment Committee* (2) there was no specific portion of the station of which the alleged occupier had the exclusive use; but in all cases where a person has had the exclusive beneficial enjoyment he has been held to be rateable. The case of *Allan* v. *Overseers of Liverpool* (3) is distinguishable; in that case it was held that the quays and wharves were not let exclusively to the appellants, because the harbour board had the power of putting the goods of other persons thereon, and charged a penal rent to persons other than the appellants who left goods on the wharves for an excessive time. There is no such fact in the present case; and, moreover, the enjoyment by the appellants is the only possible enjoyment of the gas-pipes.

Cur. adv. vult.

July 17. CAVE, J. The question we have to determine is whether the corporation of Southport are liable to be rated to the poor-rate in respect of the alleged occupation by them of certain pipes by which they supply gas to the township of Birkdale. It arises upon s. 43 of the Southport Improvement Act, 1871. It is obvious from that section that the local board are the owners of the pipes; they are to have the exclusive right of laying them down, and they are to keep them in repair; therefore, primâ facie, as owners, they are entitled to the occupation, and primâ facie they are the occupiers of these gas-pipes. They may, however, as any owner may, part with the occupation of their property for a limited time, and the question is whether they have done so by virtue of the statute so as to constitute the corporation of Southport the occupiers.

Several cases have been cited to us during the argument; but in these cases it is always necessary to guard against the danger of allowing too much weight to the decisions themselves, and

(1) 12 Q. B. D. 552. (2) 10 Q. B. D. 327.
(3) Law Rep. 9 Q. B. 180.

too little weight to the principle which underlies them, and which I take to be this: that primâ facie the owner is the occupier, but that he may divest himself of his occupation, the question in a given case being whether he has done so.

Ownership and occupation are the names given to certain bundles of rights. A man who is both owner and occupier possesses, roughly speaking, all the rights which attach to the portion of land that he owns and occupies. When he lets off this land, he divests himself of some of those rights, and retains others. When he grants a right of way or other easement over the land, he again divests himself of certain rights and retains others. When does he divest himself of the occupation, and when does he retain it? If the cases are examined, I think they will all be found to proceed upon this principle—that, so long as a man who is both owner and occupier grants away certain limited rights only, reserving to himself all the rights except those which he so grants away, he retains the occupation, and the grantee gets merely the limited rights; where, on the other hand, he grants away his rights generally (although, of course, only for a limited time, as must be the case in every tenancy), then, although he may reserve certain rights to himself, he ceases to be occupier, and the person to whom the general grant is made becomes the occupier in his place.

To illustrate this principle, let us suppose that I, being in occupation of land, grant to one man a right of way over it and to another a right of watercourse through it; in neither case do I really give up the occupation, and the two persons are not occupiers; they are merely what I may call special grantees of certain rights carved out of my occupation. On the other hand, if I grant the right to use a piece of land generally, reserving to myself, for instance, the right to enter at reasonable times for the purpose of observing the state of repair in which the premises are, I do part with the occupation, because I part with the generality of my rights, reserving only a certain specified, limited, and determined right. If the principle which I have just illustrated be applied to the cases that have been cited, it will be found to supply the key to them all, and to reduce them to an intelligible order, however complicated they may

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at first sight appear. Applying it to this particular case, the result is, that the local board of Birkdale are the owners of these gas mains, and they have granted, or rather the Act of Parliament for them has granted, to the corporation of Southport the use of the same, not generally, but simply for the purpose of the supply of gas, so that all that is taken out of the local board is the use of the mains for the particular purpose, the supply of gas, and nothing else, and all other rights remain in the local board.

The case is rendered somewhat more difficult by the fact that primâ facie the use of the mains for the supply of gas is the only use that it is contemplated shall be made of them; but I do not think that that ought to affect our decision. When a man takes a quantity of cattle on to his land it may be that he has taken as many as the land will feed, and that he does not contemplate any other use being made of the land beyond the eating of the grass by the cattle; but yet the person who takes the cattle in remains the occupier of the land, and the person whose cattle are taken in does not become an occupier; his right is a strictly limited one, and the general rights attending occupation remain in the person who takes the cattle in. So in the present case it seems to me that the rights of the corporation are strictly defined, and are limited to the use of these pipes for the purpose of delivering their gas. All other rights in the pipes remain in the local board: they are bound to repair them; they may take them up and relay them when necessary by reason of their being worn out; they may alter their direction, to a certain limited extent no doubt, if it is found that they are too near the surface or too deep down in the ground. There is therefore no definite portion of land of which the corporation of Southport have the occupation; they have the right of sending their gas through the mains wherever the mains may happen to be for the time, but that is their only right, and it is a right which is strictly limited and defined. In my judgment, therefore, the corporation come within the general rule, and are not the occupiers, and are consequently not liable to be rated to the poor-rate in respect of the occupation of these gas-pipes.

WRIGHT, J. I am of the same opinion. The substance of a case has always to be looked at. In *Reg.* v. *Stevens* (1), where the parties had expressly stipulated that there should be no tenancy, the Court nevertheless held that the terms on which the gas company were permitted by the Crown to occupy land placed them in the same position as if there had been an actual tenancy. Here there are no words purporting to give the occupation of these pipes to the corporation, and it seems to me that the local board have taken the greatest pains to prevent the corporation from being actually possessed of any part of the soil or of the pipes within the district of the local board. I think it is clear that the corporation could not, and the local board alone could, maintain trespass for any injury to the pipes, and due effect should be given to the provision that the local board alone is to have the power of laying, maintaining, and repairing the mains.

Judgment for appellants.

Solicitors for appellants: *Mellor, Smith, & May, for J. Davies Williams, Southport.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for Alfred Dickinson, Ormskirk.*

(1) 12 L. T. (N.S.) 491.

W. J. B.

C. A.

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Aug. 11.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE JUSTICES OF THE COUNTY OF LONDON AND THE LONDON COUNTY COUNCIL.

Poor-rate — Procedure — Valuation List — Time for Appealing — Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 42 (13)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 42 (10).

A valuation was made by the overseers of the parish of St. George, Hanover Square, and approved by the assessment committee of St. George's Union. The London County Council appealed against this valuation to the London Quarter Sessions, exercising the jurisdiction formerly exercised by the assessment sessions, on the ground that the totals of the rateable and gross values in the parish were too low. The appeal was entered in due time to be heard at the February sessions, 1891, but owing to the press of business in the Court, and through no default of the parties, it was not heard before the 31st of March of that year. After that date the assessment committee applied for a prohibition to the justices against hearing the appeal on the ground that the time fixed by the Valuation (Metropolis) Act, 1869, for hearing appeals had expired:—

Held, that, although the Court of quarter sessions were in the same position as the assessment sessions with regard to the restrictions as to the time for hearing appeals, those restrictions did not apply in such a case, and that the justices had authority to hear the appeal, although the time prescribed by the Act had expired; but

Held, that the prohibition ought to go on the ground that the appeal was not in reality an appeal against totals, but was an appeal against the value of hereditaments, which would not lie except from a decision of justices in special sessions.

Quære, whether the county council had any right of appeal.

RULE NISI for a prohibition.

The rule was directed to the justices of the County of London Sessions, whom it was sought to prohibit from proceeding to hear and determine certain appeals by the London County Council against the valuation list of the parish of St. George, Hanover Square. The appeals were entered for hearing at the February sessions, 1891, but owing to pressure of business they did not come on to be heard before March 31 of that year. The ground of the application was that all such appeals must, by the provisions of the Valuation (Metropolis) Act, 1869, be disposed of before March 31.

Meadows White, Q.C., and *Horace Avory*, shewed cause.

Sir E. Clarke, Q.C., *Poland, Q.C.*, and *Danckwerts*, in support of the rule.

[The following cases were cited or referred to: *Reg.* v. *Belton* (1); *Bowman* v. *Blyth* (2); *Reg.* v. *Ingall* (3); *Reg.* v. *Poplar Union Assessment Committee* (4); *Waddington* v. *Guardians of London Union* (5); *Reg.* v. *Justices of General Assessment Sessions for Metropolis* (6); *Caldow* v. *Pixell* (7); *Rex* v. *Justices of Leicester* (8); *In re Regent United Service Stores* (9); *Reg.* v. *Mayor of Rochester.* (10)]

Cur. adv. vult.

June 17. The judgment of the Court (Charles and Vaughan Williams, JJ.) was read by

CHARLES, J. In this case the assessment committee of the St. George's Union sought to prohibit the county of London sessions from further proceeding in the matter of an appeal by the London County Council against the valuation list of the parish of St. George, Hanover Square, made and deposited in accordance with the Metropolis Valuation Act, 1869, by the overseers of that parish on or about May 31, 1890, and finally settled by the assessment committee on or about October 29, 1890. The respondents in the appeal were the assessment committee, and the surveyor of taxes of the district comprising the parish, but the latter did not appear. Notice of appeal was given by the London County Council on January 14, 1891, against the valuation list, on the ground that the totals of the rateable and gross values in the parish were too low. Cases were lodged by the county council and the assessment committee, in accordance with the practice of the quarter sessions, on or before February 1, 1891, but the appeal, owing to the pressure of business in the court, did not come on to be heard before March 31, 1891. The main contention of the applicants was that on that day the

(1) 11 Q. B. 379.
(2) 7 E. & B. 26; 26 L. J. (M.C.) 57; in Ex. Ch. 7 E. & B. 47; 27 L. J. (M.C.) 21.
(3) 2 Q. B. D. 199.
(4) 13 Q. B. D. 364.
(5) E. B. & E. 370.
(6) 17 Q. B. D. 394.
(7) 2 C. P. D. 562.
(8) 7 B. & C. 6.
(9) 8 Ch. D. 75.
(10) 7 E. & B. 910.

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Charles, J.

jurisdiction of the court to hear appeals came to an end by effluxion of time, and whether this contention be well founded or not depends entirely on the construction which ought to be placed on the Valuation of Property (Metropolis) Act, 1869. The jurisdiction formerly exercised under that statute by the assessment sessions has, it is true, been transferred by the Local Government Act, 1888, to the county of London sessions; but they exercise it under the same conditions as those under which it was formerly exercised by the assessment sessions. By s. 32 of the Act of 1869 an appeal to a court of general assessment sessions against the valuation lists of the various parishes is given to (amongst other persons) any ratepayer in the metropolis and any body of persons authorized by law to levy rates or require contributions payable out of rates, if they or he feel aggrieved by reason, (1.) of the total of the gross value of any parish being too high or too low; (2.) of the total of the rateable value of any parish being too high or too low; or (3.) of there being no approved valuation list for some parish. Sect. 24 enacts that the court shall consist of three justices for Middlesex and two each for Surrey, Kent, and the City of London, and that "the said justices shall be appointed in the month of October in every year, or at such other time as may be from time to time fixed by the appointing body. They shall hold office for twelve months beginning on the first day of November, and any casual vacancy may be filled up by the appointing body." By s. 26 the Court is given power to adjourn from time to time as may be necessary for the performance of their duties under the Act, and it is provided that they shall conduct their proceedings, be convened, and be in the same position as near as may be as if they were a court of quarter sessions. The justices in assessment sessions had by s. 35 power to appoint a person to make a valuation list where none had been made by the parish authorities and approved. By s. 36 they could on an appeal direct a valuation to be made of any particular hereditament, and by s. 37 it was enacted that "where the Court appoint a person to make a valuation list or a valuation they may fix some subsequent day, either before or after the day before which all appeals are required by this Act to be heard, for receiving such valuation list or valuation, and may

adjourn the hearing to that day." By s. 40 an appeal to the superior Court on questions of law is given. Sect. 42 enacts, "With respect to the times within which proceedings under this Act and the Acts incorporated herewith are to be done, the following provisions shall have effect—that is to say: . . . (13.) The justices may hold the assessment sessions at any time after the first of February in the same year, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing thirty-first of March." Other sub-sections appoint dates for the making and deposit of the valuation list, for its transmission to the assessment committee, and its final approval by them. These last-mentioned provisions were held in *Reg.* v. *Ingall* (1), to be directory only, but there is nothing in the judgments delivered by Mellor and Lush, JJ., to indicate that they considered all the other sub-sections directory also. On the contrary we gather from the language used, especially by Lush, J., that the Court was of opinion that whilst the particular dates mentioned in the Act for the deposit, transmission, and final approval of the list need not be absolutely adhered to, the whole of the year's appeals must be disposed of before March 31 in each year. There is certainly nothing in this decision to compel us to hold that sub-s. 13 is directory as well as sub-ss. 1, 2, and 8, with which the Court was there dealing; and, although we find in the introductory words of the section a general statement applicable to all the sub-sections to the effect that the proceedings "are to be done" within the times prescribed, it appears to us by no means to follow that in each sub-section the words used must necessarily be construed in the same manner. We must inquire whether in each particular case the words are directory or imperative, and, in order to determine the question, must have regard to the general scheme and to the other sections of the statute. Now, the scheme of the statute seems to us clearly to point to the valuation list being finally fixed before the commencement of each financial year (i.e., before April 6), except in the two cases where a new valuation is ordered, or where a case has been stated for the opinion of the superior Court. Sect. 43 enacts that "the valuation list as approved by the

(1) 2 Q. B. D. 199.

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assessment committee, and, if altered on any appeal under this Act to any sessions or a superior Court, as so altered, shall come into force at the beginning of the year (commencing on the 6th day of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." A supplemental list is to be made in each of the first four years of the quinquennial period, the first of such periods beginning on April 6, 1871, shewing the alterations which have taken place in the previous twelve months, and in each of the last four years the valuation list is to be the original list, together with the new supplemental list (s. 46). A provisional list is provided for by s. 47, to meet the cases of hereditaments, reduced or increased in value during the course of any year, and when made is to be deemed to form part of the valuation list then in force. By s. 45 the valuation list is made conclusive evidence of the gross and rateable value of the hereditaments included therein for a large number of rates besides the poor-rate, and also for taxes levied under the House Tax and Income-Tax Acts. It would be highly inconvenient, in our opinion, having regard to these enactments, to read sub-s. 13 of s. 42 otherwise than as imperative. Unless March 31 in each year is regarded as an absolute limit, an appeal such as that now in question might be heard at any time during the quinquennial period, and even after its expiration, with the possible result of inflicting grave injustice on the general body of ratepayers, by throwing on the ratepayers of one year the burden of another, a result in direct contravention to the general principle of rating law, that the burdens of each year should be borne by the ratepayers in that year, a principle which forbids a retrospective rate unless specially provided for. And the hearing might in such a case, for example, as the present be almost indefinitely protracted; for the county council, in support of their contention that the parish total is too low, have challenged upwards of 3000 individual assessments, all of which the parish propose to defend. The duration of such an inquiry it is impossible to predict, but it is certain that it would be of great length, and the valuation list of the parish would thus remain

for months, if not years, in an indeterminate condition. Other sections of the Act, as well as the terms of sub-s. 13 of s. 42 itself, lead to the same conclusion. Thus the power to adjourn the hearing of an appeal given by s. 34 is expressly limited "to any day not later than the day before which all appeals to them are required by this Act to be heard." The same phrase is used in s. 37 above referred to, whereby the Court is set free from the time restriction with regard to receiving a specially prepared valuation list. Sect. 44, indeed, contemplates the possibility of an appeal being pending at the commencement of a financial year, and provides that, notwithstanding the pendency of such an appeal, the valuation list shall come into force unaltered. But though the words are general they are satisfied by reference to the two cases mentioned in ss. 37 and 40, where there has been a revaluation ordered, or where an appeal has been made to a superior Court. We may add that the exception introduced into sub-s. 13 of s. 42 is meaningless unless the other words of the sub-section are held to be imperative. It was strongly urged upon us that to adopt this construction will deprive the parties aggrieved of the right of appeal given to them by the Act, and it cannot be denied that our decision will lead to that result. But we must consider the balance of convenience, and weigh against the detriment, which may or must arise to individuals, the serious inconvenience and injustice to the ratepayers, which a contrary holding would entail. The question whether the legislature intends a provision to be imperative or directory must depend in each case on the scope and object of the enactment, and, having regard to the general scheme of the statute and to its express provisions, we have no doubt the legislature intended, and has sufficiently expressed its intention, that no appeal (with the specified exceptions) should be heard after March 31 in each year. Many decisions on other Acts were referred to, but they furnish us with little, if any, assistance, and do not affect the conclusion at which we have arrived.

Two other points were raised by the applicants. They contended that the county council, in their capacity of a "body of persons authorized by law to levy rates or require contributions payable out of rates in the metropolis," had sustained no appealable

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grievance by reason of the total of the gross and rateable value of a particular parish being too high or too low. In any case their precept for contribution would be satisfied. On the other hand, it was argued that the grievance might be appealable though not pecuniary, and that undue inequality of assessment was in itself a statutory grievance of which the county council could complain. Further, it was contended by the applicants that on an appeal against totals the individual assessments cannot be challenged, but that matters of principle only can be raised, such, for example, as a deduction from gross value in excess of the *maximum* allowed by the Act. (See s. 52 and sched. 3.) To this it was replied that there is nothing in s. 32 to limit the appeal, and that the most effective way of challenging a total is to challenge the constituents of which it is composed. Both these matters are of wide importance, but in the view we take of the question of time it is unnecessary to pronounce any opinion upon them. For the reasons we have given we think that the jurisdiction of the Court to hear this appeal came to an end on March 31, 1891, and therefore make this rule absolute with costs.

Avory, submitted that the Court had no jurisdiction to give costs.

CHARLES, J. We have considered the question, and we think that the point is decided in *Wallace* v. *Allen*. (1)

Rule absolute with costs.

A. P. P. K.

The London County Council appealed.

1893. Aug. 1. *Bosanquet, Q.C.*, and *Horace Avory*, for the county council, in support of the appeal. The provisions of the Valuation of Property (Metropolis) Act, 1869, are not limits of time, but directory only: *Reg.* v. *Ingall* (2), referred to with approval by *Thesiger*, L.J., in *In re Regent United Service Stores*. (3) The scope and object of the statute are the only

(1) Law Rep. 10 C. P. 607. (2) 2 Q. B. D. 199.
(3) 8 Ch. D. 75, at p. 82.

guides in determining whether its provisions are directory or imperative: *Rex* v. *Ingram* (1); *Reg.* v. *Mayor of Bolton* (2); *Caldow* v. *Pixell.* (3) It is no impediment to construing a clause as directory that, if it is so construed, there is no remedy for non-compliance with the direction: *Gwynne* v. *Burnell.* (4) The Valuation (Metropolis) Act deals with the same subject-matter as the Union Assessment Act, which is of general application. Quarter sessions are continuing, and the jurisdiction remains though the members of the Court may change; and similarly the assessment sessions would have been continuous.

Even if an assessment sessions would have been bound by the limitation as to time, the same restriction as to procedure does not affect the justices in quarter sessions.

The mayor and assessors under the Municipal Acts changed every year; but though not a corporation, they were held to be in the nature of a standing tribunal to whom a writ of mandamus was well directed though the individual members were changed: *Reg.* v. *Mayor of Rochester* (5); *Reg.* v. *Mayor of Bolton.* (2)

The county council are aggrieved because their power to raise money may be affected. As, for instance, it may hamper them as an improvement authority to have a smaller value to tax.

Sir E. Clarke, Q.C., and *Poland, Q.C.* (*Danckwerts*, with them), for the assessment committee. Throughout the Valuation (Metropolis) Act, 1869, the question of time is treated as essential to the proceedings, and the appeals are spoken of as being "required" to be heard before a certain day. That is a word of limitation, and not merely directory. The case of an individual ratepayer may be a hard one, but the general interest requires that the lists should be finally settled by March 31, as they come into force on April 6. There must be some finality, otherwise the greatest confusion would arise from trying to graft yearly supplemental lists on a valuation list which has not been itself settled. The county council has its annual budget, and having before them the totals of each parish

(1) 2 Salk. 593.
(2) Law Rep. 5 Q. B. 251.
(3) 2 C. P. D. 562.
(4) 2 Bing. N. C. 7, at p. 39.
(5) 7 E. & B. 910; and in the Exchequer Chamber, E. B. & F. 1024.

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they make their precept accordingly, and, assuming the total valuation of a parish to be lower than it should be, this makes no difference to the county council, who in the aggregate receive all they require. Even if they were aggrieved, their only appeal would be against the totals as totals, and not against the valuation of particular hereditaments. [They cited *Reg.* v. *Belton* (1), and *Bowman* v. *Blyth.* (2)]

Bosanquet, Q.C., in reply.

Cur. adv. vult.

1893. Aug. 11. LORD ESHER, M.R. In this case the London County Council brought an appeal against the assessment committee of the St. George's Union before the County of London Sessions. The appellants objected to the totals of the gross and rateable values of the parish of St. George's, Hanover Square, in the valuation list of the parish, as being too low, on the ground that a large number of hereditaments situated in the parish and included in the valuation list were not correctly and fairly assessed, but were assessed below their true annual value.

It will be necessary for us to consider what that appeal is and against what it is; but in order to determine the case I think it will also be necessary to go through some of the sections of the Valuation (Metropolis) Act, 1869. The Divisional Court has prohibited the sessions from proceeding further in this matter on the ground that the matter was not finished before March 31 of the year in question. Now, when we look at this statute, the first section which seems to me to be of importance is s. 6: "The overseers of every parish to which this Act extends, within the time in this Act mentioned, shall make and sign a valuation list of their parish." Then, by s. 11, objections may be made before the assessment committee by any person authorized under the Acts to object who feels himself aggrieved by reason of the unfairness or incorrectness of the valuation of any hereditament. The overseer, therefore, is to make a valuation list which consists of his valuation of all the hereditaments in the parish, and if any person objects to the correctness of the valuation list by reason of any hereditament being wrongly assessed in it objec-

(1) 11 Q. B. 379. (2) 7 E. & B. 26, 47.

tion must be made before the assessment committee. Then, when that appeal is before the assessment committee, the assessment committee, by s. 14, within the time in this Act mentioned, shall revise the valuation list in accordance with this Act. Therefore, it is the assessment committee who are to revise the valuation list. The valuation list was made by the overseers. The valuation list by the overseers consists of their valuation of all the hereditaments. Any person aggrieved by what they do is to complain, and then the assessment committee within the time shall revise the valuation list—that is, shall hear those complaints and determine them. When the assessment committee have finally approved such valuation they shall cause the total of the gross value and rateable value on such list to be ascertained and inserted in the list.

Sect. 17 brings in a new person, or a new set of persons, to act. Up to this moment it is the overseers and the assessment committee; but now, by s. 17, the clerk of the managers of the Metropolitan Asylums District, who are now represented by someone else, shall, within the time in this Act mentioned, cause the totals of the gross and rateable values of all the valuation lists to be printed. Those totals are the totals of the gross and rateable values of the valuation lists. Therefore, what has that authority to do? To take all the valuation lists and see what the total of each valuation list is, to add all those, as to the gross values and the rateable values, together—that is, to do the arithmetic of the matter and then print the result.

Now s. 18: "In every petty sessional division in the metropolis the justices of the peace acting in and for such division shall, in every year at the time mentioned in this Act, hold a special sessions for hearing appeals under this Act against the valuation lists of the several parishes." Therefore they are to hear appeals against the valuation lists—that is, the valuation lists adopted by the assessment committee.

Sect. 19 shews the persons who may appeal against the valuation list, and, certainly, the descriptions there would not include such a body as the present county council. But, by s. 20, "the justices in special sessions under this Act shall not hear"—this is a negative section—"any appeal touching any matter with

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respect to which notice of appeal to the general assessment sessions has been served in a manner prescribed by this Act, and shall not hear any appeal touching any part, or alter any part, of the valuation list except the part relating to the value of a hereditament, and a decision of such justices and an alteration by them of the value of an hereditament in the valuation list of any parish shall affect only the rights of the ratepayers of such parish among themselves, and shall not of itself in any way alter the totals of the gross or rateable value of such list as settled by the assessment committee, but may form a reason for an appeal against such totals to the assessment sessions and superior Courts as hereinafter mentioned." Therefore, the special sessions cannot deal with any objection to the totals made by the assessment committee, and certainly not to the totals made by the authority who now represents the clerk and the managers of the Metropolitan Asylums Board; they can only entertain an appeal against the value of hereditaments.

Then comes s. 23, which constitutes the Court of Assessment Sessions: "For the purpose of hearing appeals under this Act against any valuation list in the metropolis, the justices of the peace appointed as hereinafter mentioned shall at the time mentioned in this Act assemble and hold a court of general assessment sessions (in this Act referred to as the assessment sessions)." And by s. 24 the justices who are to form the Court of general assessment sessions shall be appointed annually as therein mentioned. Sect. 26 says: "The Court of general assessment sessions may adjourn from time to time as may be necessary for the performance of their duties under this Act." It is not a power of adjournment at large, but only so far as may be necessary for the performance of their duties under this Act in question; and to this is added, "and (for the purpose of giving judgment only) from place to place in the metropolis." Then they shall, with respect to the attendance and examination of witnesses and some other things, but not including the power of adjournment, "have the same jurisdiction and powers, and be in the same position, as a court of quarter sessions; and, subject to the express provisions of this Act," shall do other certain things. Then we come to s. 32: "Any ratepayer, or any surveyor of taxes, and

any overseer, with the consent of the vestry of his parish, who may feel aggrieved by any decision of the assessment committee, on an objection before them to which he was a party, or by any decision of special sessions, whether he was a party or not, may appeal against such decision to the assessment sessions." Therefore, the persons who can appeal against a decision of the assessment committee are those enumerated, and only those. Any of them, whether a party or not, may appeal against any decision of the special sessions, and may appeal against such decision to the assessment sessions. Then the same section, after mentioning other bodies and persons, continues: "And any body of persons authorized by law to levy rates, or require contributions payable out of the rates in the metropolis or such county, may appeal to the assessment sessions if they or he feel aggrieved by reason (1.) of the total of the gross value of any parish being too high or too low; (2.) of the total of the rateable value of any parish being too high or too low." There seems to me to be no appeal against totals except those thus mentioned.

Then, by s. 34: "The justices in special sessions and in assessment sessions respectively shall in open court hear and determine all appeals brought before them in such order as they may respectively from time to time appoint. They may adjourn the hearing from time to time and to any day not later than the day before which all appeals to them are required by this Act to be heard." Now, we must look for that time, and we find it in s. 42, which deals with the times within which proceedings under this Act and the Acts incorporated therewith are to be done. Amongst those are the times during which the special sessions may be held. Sub-s. 10: "The justices may hold the special sessions at any time after the 30th of November in the same year, which will enable them to determine all appeals before the ensuing 1st of January." There is the time fixed as to them; but the one we have to deal with, and which the Court had to deal with, is sub-s. 13: "The justices may hold the assessment sessions at any time after the 1st of February in the same year, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing 31st of March."

It seems to me that looking at those words which are under

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a heading, "Time for proceedings," they are a description of the time within which the justices may hold the sessions; and when you look at the purpose for which that time is fixed—that upon that valuation or upon the determination by March 31 all rates are to be calculated, and by s. 45 many important taxes are to be calculated—I cannot say that in my opinion that limitation of time in sub-s. 13 is merely directory. I think it is imperative; but I shall have presently to state what practical limitation or explanation I think can be put upon it; but I think it is a limitation of time enacted, and imperatively enacted, by the statute.

The justices are to administer the law, and certain things are to be done within a certain time. But then if the parties who appeal obey this, and enter their appeal within a time which would enable the justices in the ordinary course to determine by March 30—and if the only reason why the justices do not determine the particular case by March 30 is through some accident or some misfortune of the Court itself with which the parties have nothing to do, and which they cannot control—is it to be said that that comes within the meaning of this section? There might be general illness among the justices, or, as in this case, an extraordinary glut of business, which was a matter with which each person desiring to appeal had nothing to do, and could not help, could not anticipate, and could not obviate or calculate upon. This Act must be read as all enactments are, subject to their not being made absurd by matters which never could have been within the calculation or consideration of the legislature, and I think we must say that the Act is satisfied if the parties have entered their appeal within such a time as, according to the ordinary practice of the Court would enable that particular case to be heard and determined by March 30, and that therefore the glut of business in the court, and the inability of the Court to cope with it, is not to be brought into play against the parties, who as far as they are concerned, have obeyed the imperative enactment of the statute by putting down their appeal at a time which would enable the Court, according to its ordinary course of practice, to hear and determine the case by March 30.

I do not think, therefore, that if the hearing was prevented only by the difficulties of the Court itself, and the Court being unable to cope with its business, that would be a sufficient ground to prohibit the magistrates from hearing the appeal.

I must now see whether the assessment sessions could have heard this appeal, and that depends on what this appeal is. It is said to be an appeal against the totals of the gross and rateable values of the parish of St. George's, Hanover Square. Well, the totals of the annual value are shewn. Who makes them? By s. 14: "The assessment committee within the time in this Act mentioned shall revise the valuation list in accordance with this Act and the Acts incorporated herewith. When they have finally approved such valuation list"—in this case they did—"they shall cause the totals of the gross and rateable value in such list to be ascertained and inserted in the list." If this is really an appeal against those totals, how can a total be wrong? A total can be wrong if the man has added up the valuation list wrongly: then of course the total of all of them would be wrong. But that is mere arithmetic. Indeed, I should say that that is a mere ministerial operation which is settled in a minute. Or it may be wrong if the valuation list of some particular parish is left out altogether. No one has suggested, and no one can suggest, that there was any wrong arithmetic in this case in adding up the totals. No one can suggest, and they do not suggest, and it is not true to say that they mean to suggest, that any valuation list had been left out. It is clear to my mind that they do not object to the totals as totals, but that they object to something else—they object to them as being too low, upon the ground that a large number of hereditaments in the parish are not fairly or correctly assessed. That is their appeal, and there is all this immense volume of objections against particular assessments which shew and make clear, beyond all doubt, that this appeal is not against totals as totals, but that it is upon the ground that certain hereditaments in the valuation lists are not correctly and fairly assessed. Had the general assessment sessions any power to deal with that? It seems clear from the sections I have read that that appeal would be an appeal to the special sessions, and after it had been decided

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there, then there would be an appeal from their decision to the general assessment sessions. The appeal to the general assessment sessions in respect of wrong valuations of hereditaments is from the justices of the petty sessions, and is not direct from the assessment committee to the general assessment sessions. If it were an appeal from the decision of the petty sessions justices, then any ratepayer and any surveyor of taxes and any overseer, whether he was a party or not, would be within the list of persons who may so appeal. The London County Council could not be a party to an appeal to petty sessions, and they have tried to bring direct before the general assessment court a subject-matter which they could not bring before the petty sessions, and which they had no right to bring before the general assessment sessions. Neither they nor anybody else can on such complaint come to the general assessment sessions direct.

I think, therefore, on that ground that the general assessment court had no jurisdiction to hear this appeal so brought, either by the London County Council or by any one else, and that this prohibition must be affirmed.

I have gone into the question of time in the hope of aiding other people, by shewing that where the parties who properly may appeal either to petty sessions or to general sessions have done everything within the time imperatively appointed in the section, and their case may not have been heard merely through the failure or inability of the Court to hear it, their cases may be heard after March 30, when that is the only difficulty which has been raised in the way. As to this appeal of the county council, I think the prohibition was right and must be affirmed.

BOWEN, L.J. I shall be able to compress what I have to say into a very short compass. The question is, whether a writ of prohibition ought to go, and the first ground on which it is alleged that it ought to go is one which, if good, affects a number of other persons besides the county council. The second and third grounds on which it is alleged this writ of prohibition ought to go affect the county council, and depend upon the nature of this particular appeal. But it is obvious that the first

ground on which the Court below decided is a ground which, whichever way the decision is, has far-reaching consequences, and it is essential to consider, in pronouncing an opinion in the Appeal Court, the true effect of the sections in these Acts of Parliament which prescribe and limit the times for the sittings of the Court. A similar course of reasoning applies to other Courts besides the one with which we are to deal; but I will confine myself to the present case and to the sitting of the general assessment sessions. The court of quarter sessions which has taken its place inherits only the jurisdiction which originally belonged to the court of general assessment sessions, as constituted by the Valuation (Metropolis) Act of 1869. We must, therefore, go back to the Act of 1869 in order to consider what is the jurisdiction of the general assessment sessions under that Act. The Act prescribes the limits of time within which the Court is to sit. They are to sit after February 1, and it is not intended that they should sit after March 30. The period between February 1 and March 31 is therefore the statutory period intended to suffice for the sittings of the Court. Are those sections which deal with the period and its termini, the initial terminus, and the final terminus, simple counsels of perfection directing the Court to do it, but involving no consequences if the Court does not do it, except that they may of course be complained of, or that a mandamus may go to them to compel them? That is an extreme view. The other extreme view is this, that this definition of the time is rigid and goes to jurisdiction, and that as soon as the midnight hour has struck on March 30 the Court expires, so to speak—its jurisdiction ends; and whatever else is done by that Court, or purports to be done by that Court, is not done by a Court at all, but is coram non judice. That is the other extreme view of the section.

Now, it seems to me that the truth lies rather between the two, and that there is no such exact division of sections in Acts of Parliament into those that are directory and those that are imperative as is ordinarily assumed to be a categorical decision which exhausts every possible class of section. You must look at each Act of Parliament and at each section to see exactly what it means. No other rule of construction of Acts of

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Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all.

It is clear to begin with that time is of the essence of the matter—that is certain. It is necessary that the appeal should not be presented before a certain date, and it is necessary that the ministerial or mechanical operations should be performed within the periods which are assigned to them, and it is essential for the performance of public business, both for rating and taxing purposes, that March 31 should be taken as the practical limit, and time in that sense is of the essence of the matter. It cannot be said that it makes no difference to the public or to the parties whether these termini of time are observed or not. On the contrary, it makes a great deal of difference. In that sense it is not merely a recommendation to the sessions that they should do this if they like to, but that they can do something different without being mandamused or prohibited. The sessions are directed, and to my mind as regards themselves and their actions those directions are imperative: they bind the will and the discretion of the sessions.

Now take the opposite extreme. What is the ordinary rule of construction when construing Acts of Parliament and other documents? It is, that if the language is ambiguous and admits of two views you must not adopt that view which leads to manifest public mischief. Here is a broad scheme of metropolitan taxation and rating by which the parochial ministerial officers are empowered in the first instance to place values on hereditaments for the purpose of taxation in the broad sense. In a free country the very essence of such a system must be that there should be an appeal to some body who can say whether those officers are doing what is just. If no appeal were possible, I have no great hesitation in saying that this would not be a desirable country to live in, where every parochial officer might do as he liked in this matter. It is quite true that there is enough difficulty in appealing as it is; but if there is to be no appeal at all possible the system would be intolerable. Therefore it is of the essence, the pivot of the system, that there should be a right of appeal.

Then comes this Act of Parliament, which says that the Court has to sit between February 1 and March 31.

Is it conceivable that a person who is grossly over-rated, and has presented an appeal, or that those who complain of gross over-rating, and who appeal on that ground, or who appeal on the ground of other injustice done to them under the Act, are to lose their right of appeal, because the final hour has struck on March 30, so that, without any fault of their own, they are relegated to the tender mercy of the parish officers, and whatever mistake has been made cannot be corrected? That is impossible if we can find any construction of the Act of Parliament which can avoid so great an injustice. It seems to me, therefore, that reason and sense drive one to find, if we can, an exception from the imperative language of the Act (which is intended to be imperative as regards the voluntary action of the parties, and of the Courts) where the block of business is such, or such events happen, that the Court cannot conclude its business before March 31. Were this otherwise, a pertinacious advocate who chose to argue for three days might destroy the right of appeal of someone else. It seems to me that although the Court of Assessment Sessions is bound to exercise its own discretion as to fixing dates for appeals, as to regulating adjournments, and as to hearing cases, so as, if possible, to finish before March 31, and although the parties are bound to lodge their appeals within the statutory periods given by the Act of Parliament, nevertheless, if by necessity or default of the Court itself, whether culpable or not, the time has passed, the Court continues clothed with authority to do justice, which, if it were not done by the Court, cannot be done at all.

But is there anything in ss. 23, 26, 34, or 42 which prevent that view being adopted? It seems to me that there is nothing. My Lord has gone through them at length; but I think it will not only be found that there are no negative words which in the least preclude that view being taken, but it is affirmed by words which direct that under s. 34 the Court shall hear and determine all appeals that come before it. So that, on that ground, I should say that the prayer of those who apply for the writ of

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prohibition fails, and fails on a ground which it seems to me does not depend on the nature of the appeal in question, but depends upon the considerations of general public interest which impel and compel us to come to the view I have stated.

It seems to me, however, that there is another ground upon which this writ of prohibition ought to go. This appeal, though framed as an appeal against totals, is really an attempt to revise the valuation list, and the rateable value in the valuation list of the hereditaments therein. That such an appeal should be presented without the presence of the parties who were rated would seem to me manifestly unjust. That the London County Council, or the Metropolitan Board of Works in their time, could complain of a man's hereditament being undervalued without the man being heard, and only the assessment committee present to defend the valuation, or whoever is the other party, would be to my mind manifestly unjust. It is, however, obvious that to present such an appeal with such an effect is not really to appeal against totals, but to appeal against the valuation. It is in vain for those who come before us on the part of the London County Council to say, "Let us go to the appeal sessions; this is only one of the grounds on which we put forward our appeal against totals." We must take the thing in the grip of our hands and see whether this is anything other than an appeal against the valuations. It is not; and on that ground, without further discussing the question whether the London County Council are parties who are aggrieved or not, this writ of prohibition must go.

KAY, L.J. The most important question raised in this case is, whether s. 42, sub-s. 13, of 32 & 33 Vict. c. 67, is imperative or only directory. The section provides: "With respect to the times within which proceedings under this Act, and the Acts incorporated herewith, are to be done, the following provisions shall have effect." One of the said provisions is sub-s. 13: "The justices may hold the assessment sessions at any time after the first of February in the same year, which will enable them to determine all appeals (except when a valuation list or valuation is ordered) before the ensuing thirty-first of March."

The object of the statute, as stated in the preamble, is to provide a common basis of value for the purposes of government and local taxation, and to promote uniformity in the assessment of rateable property in the metropolis. It provides, by s. 5, for the appointment of an assessment committee.

Sect. 6: Parish overseers are to make valuation lists of their respective parishes. Sect. 17: The totals of which are to be printed and copies sent to various bodies, including the Metropolitan Board of Works, the place of which is now taken by the London County Council. By s. 18 appeals against the several lists are to be heard at special sessions of each petty sessional division, Sect. 20: as to the value of any hereditament only. But an alteration of such value is not to alter the totals, "but may form a reason for an appeal against such totals to the assessment sessions and superior Court, as hereinafter mentioned." The persons who may appeal to special sessions are, by s. 19, any ratepayer, or overseers of the particular parish, and any surveyor of taxes. By ss. 23 and 24, a special court for assessment sessions is to be appointed annually in October, to hold office for twelve months, beginning on November 1. Sect. 26: The Court may adjourn from time to time as may be necessary for the performance of their duties under the Act. Sect. 32 enables, amongst others, any body of persons authorized by law to require contributions out of the rates in the metropolis to appeal to this special Court if they feel aggrieved by reason (1.) of the total of the gross, or (2.) of the rateable value of any parish being too high or too low, or (3.) of there being no approved valuation list for some parish.

Pausing there, I observe that such appeals are only to be against totals, not against the valuation of any hereditaments, nor can they, it would seem, appeal against any total on the ground that a particular hereditament or hereditaments are improperly valued, unless the petty sessions, under s. 20, has altered the valuation of such hereditament or hereditaments.

Sect. 34 provides: "The justices in special sessions and in assessment sessions respectively shall in open court hear and determine all appeals brought before them in such order as they may respectively from time to time appoint. They may adjourn

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the hearing from time to time, and to any day not later than the day before which all appeals to them are required by this Act to be heard; and, in the case of assessment sessions, for the purpose of obtaining the decision of any superior Court, to any day necessary for that purpose." . . . . "They may confirm or alter the valuation list, so far as it is questioned by the appeal, in such manner as they think just, but shall not make any alteration in contravention of this Act."

With respect to the question whether s. 42, sub-s. 13, is imperative or only directory, it is to be observed that it only incidentally mentions the day before which all appeals shall be determined. There is no express enactment that all appeals shall be determined before that day, nor that any appeal not then determined shall not be determined at all.

Sub-s. 10 is a similar provision as to the special petty sessions. If one is imperative, the other must be so also. The consequence would be that if the number of appeals to the petty sessions or to the assessment committee should happen to be so great that by no possibility could they all be heard in the time, those not so determined could not be determined at all. A ratepayer who had appealed in due time to the petty sessions, but whose appeal was not reached within the time, would by this construction have his right of appeal destroyed. The more wrong the valuation the greater, presumably, would be the number of appeals, and the less would be the chance of having them heard. It would require very explicit and clear words to compel me to come to such a conclusion. I do not think that the words are clearly intended to produce this result. Sect. 44 contemplates that appeals may be pending when the valuation list comes into force, and may be altered afterwards by decisions of the assessment committee, and provides what is to be done in such cases. It is argued that this is satisfied by the provisions in s. 34 for adjourning the hearing pending the decision of a superior Court; and s. 37, which authorizes an adjournment where a new valuation list or new valuation is directed by the Court. But I do not see why s. 44 should be confined to these cases. It may apply to any pending appeal which shall be determined after the valuation list has come into force.

I am of opinion for these reasons that s. 42, sub-ss. 10, 13, are directory only in such circumstances as exist in the present case, and that appeals lodged in due time may and ought to be determined by the petty sessions and assessment committee respectively after the days mentioned in those sub-sections.

This view is consistent with the decisions upon other sub-sections of s. 42. In *Reg.* v. *Ingall* (1) it was expressly decided that the failure to observe the times fixed by s. 42 should be deemed not to render void a valuation list: "The more reasonable construction is to hold that the terms of s. 42 are only directory."

The next question is whether the appeal in this case by the London County Council is a proper one, and, if not, whether the remedy by prohibition is applicable.

I confess I have some difficulty in seeing that they are aggrieved. By s. 32 the right of appeal is given to them amongst others if they "feel aggrieved." The words are designedly large, but they must mean, if the particular thing complained of could in some way injure the appellants. If not, they have no right of appeal. I understand that upon receipt of all the totals, including this now complained of, the London County Council fixed their budget for the year, rating all ratepayers at a certain sum in the pound, and that this rate is all they require. If on this appeal they were to succeed in altering the total as to this particular parish it would not benefit the London County Council in any way. If in consequence they could and did alter their rate, the only persons benefited or affected would be the other parishes whose totals were not altered. There is no ground for supposing that in any of the five years during which the valuation is to last an alteration of it would be of the least advantage to the London County Council.

But supposing that they can be treated as aggrieved, it appears that their objection to the total in this parish is that a number of hereditaments within it have been valued at too low a figure. They make no other objection to the total. As I have pointed out by s. 20, this objection is not open to them

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until the petty sessions have altered the valuation of the particular hereditament, and the London County Council have no right to appeal to the petty sessions. Therefore their appeal on this ground is wrong and ought not to be entertained. It is impossible to suppose that the London County Council could obtain an alteration in the valuation of a particular hereditament behind the back of the owner or occupier.

If the assessment sessions were to entertain an appeal on this ground, it seems to me that they would be exceeding their jurisdiction. An alteration of the totals for such a reason would be an "alteration in contravention of this Act," which by s. 34 they are expressly forbidden to make.

I therefore think that it is a case for prohibition, at least to the extent of prohibiting them from entertaining an appeal against the total, on the ground that any particular hereditament or hereditaments within the parish have been wrongly valued, unless and until such wrong valuation has been decided and the valuation altered by the justices in petty sessions under ss. 19 and 20.

Appeal dismissed.

Solicitors for the assessment committee: *Caprons, Dalton, Hitchins, & Brabant.*

Solicitor for the county council: *W. A. Blaxland.*

A. M.

BARTHOLOMAY BREWING COMPANY (OF ROCHESTER), LIMITED, APPELLANTS; WYATT, RESPONDENT.

NOBEL DYNAMITE TRUST COMPANY, LIMITED, APPELLANTS; WYATT, RESPONDENT.

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July 18, 19;
Aug. 12.

Revenue—Income Tax—English Limited Companies carrying on Trade Abroad—Annual Profits or Gains—Profits Earned Abroad not Remitted to England—Actual Receipt of Profits in England—5 & 6 *Vict. c.* 35, *s.* 100, *Sched. D, Fourth and Fifth Cases*—16 & 17 *Vict. c.* 34, *s.* 2, *Sched. D.*

An English limited company, registered under the Companies Acts, and having an office in London, was formed to acquire certain brewing businesses in New York State, in the United States of America. By a law of that State an English company is prohibited from owning and carrying on a brewery there, and the English company thereupon arranged for the formation of an American company, with share capital, and having seven trustees appointed to manage, in the interests of the English company, the businesses in America. All the shares in the American company—except seven, of which each of the trustees held one as a qualifying share—were held by and in the name of the English company. The brewing trade, on which the profits wholly depended, was carried on exclusively at the city of Rochester in New York State. At the end of each financial year the trustees of the American company sent the English company the accounts of the breweries at Rochester for the year, and the directors of the English company, having agreed upon the amount to be distributed out of the profits, informed the American company of the rate of dividend which the directors thought should be declared by that company on their shares. On hearing that the American company had declared a dividend the directors declared a dividend of a similar value upon the shares in the English company. No dividend warrant was issued by the American company, but the amount of profits to be divided on the shares held by the English company, so far as that amount was required for distribution among the shareholders of the English company, was sent over to the English company in London, such portion of the dividend as was required for certain American shareholders in the English company being retained by the American company, and distributed by them direct in America on behalf of the English company:—

Held, that the profits of the English company arose from "foreign possessions," so as to bring the case within 5 & 6 Vict. c. 35, s. 100, Sched. D, Fifth Case; that the portion of the profits retained in America for distribution among the American shareholders of the English company was not received by that company in England within the meaning of the Fifth Case; that the business on which the profits depended being wholly carried on abroad, the decision of the House of Lords in *Colquhoun* v. *Brooks* (14 App. Cas. 493) applied, and, therefore, that the English company were not liable to pay income tax upon the portion of the profits retained in America.

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In another case the appellant company, an English limited company, registered under the Companies Acts, and having an office in London, was formed to acquire, and did acquire, shares in various companies or corporations, with limited liability, trading in explosives in England and in Germany. The affairs of the company were managed and controlled wholly by its directors. It did not carry on any manufacturing business, nor sell any materials or goods, in the United Kingdom or elsewhere. In dividing any profits made the directors declared a dividend in London on all the appellant company's shares, of which a large number were held by foreigners living in Germany. The dividends due to the appellant company in respect of its shares in the German companies were, at the request of the directors, paid by those companies into banks abroad, and applied in paying the dividend, when declared, to the foreign shareholders of the appellant company:—

Held, that this case also was brought within the decision of the House of Lords in *Colquhoun* v. *Brooks* (14 App. Cas. 493), and therefore that the appellant company was not liable to pay income tax on the profits paid by way of dividend to the foreign shareholders of that company in Germany.

THESE were two cases stated by the Commissioners of Income Tax for the City of London, under 43 & 44 Vict. c. 19, s. 59. In each case the appellant company, being dissatisfied with an assessment to income tax made upon them, had appealed to the commissioners, who confirmed the assessment. The respondent was the surveyor of taxes.

By 16 & 17 Vict. c. 34, s. 2, duties are imposed (Sched. D) "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every 20*s.* of the annual amount of such profits and gains:

"And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every 20*s.* of the annual amount of such profits and gains:

"And for and in respect of all interest of money, annuities,

and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every 20*s.* of the annual amount thereof."

By s. 5 the duties thereby granted shall be assessed and raised under the provisions of 5 & 6 Vict. c. 35.

By 5 & 6 Vict. c. 35, s. 100, Sched. D:—

"*Fourth Case.*—The duty to be charged in respect of interest arising from . . . foreign securities.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year, without any deduction or abatement.

"*Fifth Case.*—The duty to be charged in respect of . . . foreign possessions.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain and arising from property which shall not have been imported into Great Britain, or from money or value so received on credit or on account in respect of such remittances, property, money, or value brought or to be brought into Great Britain, &c."

The case of *Bartholomay Brewing Company (of Rochester), Limited*, appellants; *Wyatt*, respondent, was as follows:—

1. At a meeting of the Commissioners of Income Tax for the City of London, held at the Guildhall Buildings on November 27, 1890, the Bartholomay Brewing Company (of Rochester), Limited, appealed against an assessment of 108,935*l.* 10*s.*, made upon the appellant company for the year ending April 5, 1890, under Sched. D of 16 & 17 Vict. c. 34, s. 2.

2. The appellant company is an English company, registered on April 11, 1889, under the Joint Stock Companies Acts, with memorandum and articles of association, and with a registered office situate at No. 23, Austin Friars, in the City of London.

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3. By the memorandum of association, the objects for which the company is established are (inter alia) as follows:—

(*a.*) To enter into and carry into effect, with such modifications (if any) as may be agreed upon, a certain agreement with Russell Henry Monro mentioned in the articles of association, being an agreement relating to the purchase by the appellant company from R. H. Monro of certain brewing and malting businesses in the United States of America.

(*b.*) To carry on business as brewers, maltsters, &c., and to buy, sell, manipulate, and deal (both wholesale and retail) in commodities of all kinds which can be conveniently dealt in by the company in connection with any of its objects, and to carry on any other businesses, whether manufacturing or otherwise, which can be conveniently carried on in connection with any of the company's objects.

(*c.*) To allow or cause the legal estate and interest in any of the properties referred to in the aforesaid agreement, or in any other businesses or property acquired, established, or carried on by the company, to remain or be vested or registered in the name of or carried on by any American company, formed or to be formed, and either upon trust for, or as agents or nominees of, this company, or upon any other terms or conditions which the board of directors may consider for the benefit of this company, and to manage the affairs, or take over and carry on the business, of any such American company, either by acquiring the whole or part of the shares or stock, or debentures, or other securities thereof, or otherwise howsoever, and to exercise all or any of the powers of any such company, or of holders of shares or stock, or debentures or securities thereof, and to receive and distribute as profits the dividends and interest on such shares, stock, debentures, or securities.

(*f.*) To purchase, subscribe for, or otherwise acquire, and to hold the shares, stocks, or obligations of any company in the United Kingdom, in the United States of America, or elsewhere, or upon a distribution of assets or a division of profits to distribute any such shares, stocks, or obligations amongst members of this company in specie.

By the memorandum of association the liability of the members

is limited. The capital of the company is 620,000*l.*, divided into 62,000 shares of 10*l.* each.

The 3rd article of association provided that the company should forthwith enter into and carry into effect the agreement with Russell Henry Monro, who had lately acquired the properties mentioned therein, subject to any modifications thereof which the board might approve.

4. A prospectus was issued by the appellant company for the purpose of obtaining subscriptions to the share capital, which correctly stated as follows:—

"This company has been formed for the purpose of carrying out an amalgamation of three large breweries (the Bartholomay Brewery, the Rochester Brewery, and the Genesee Brewery), situate in the city of Rochester in the New York State, U.S.A., and carrying on the businesses under one management." The prospectus also stated that a first mortgage on certain of the leasehold, freehold, and other property purchased by the company would be given to the trustees of the debenture-holders of the company, and that subject to such mortgage the whole of the property acquired would be conveyed to an American corporation in New York State, the shares of which American corporation would be held by or in trust for the appellant company.

5. By reason of the terms of an Act of the Legislature of the State of New York, United States of America, dated February 17, 1848, and entitled "An Act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes, and of certain Acts extending and amending the same," it is prohibited for an English company to own and carry on a brewery in the State of New York, and the appellant company therefore formed or arranged for the formation of a company in the United States of America hereinafter termed "The American company."

6. The American company was incorporated with the corporate name of "Bartholomay Brewery Company" for the purpose of carrying on the business of manufacturing beer, ale, and other malt liquors; and by the memorandum of association registered in New York it was provided that the capital stock should be $1,000,000, the time of the existence of the company should be

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fifty years, the shares of the company should be 10,000 in number, of $100 each, and that a number of trustees, occupying positions similar to those of directors in England, should manage the concerns of the company. The trustees for the first year were all citizens of the State of New York, except R. H. Monro, who resided at York in England, and the names of the town and county in which the operations of the company were to be carried on were Rochester, Monroe County, in the State of New York.

7. By the code of by-laws of the American company, "The number of the trustees of the company is to be seven, who shall respectively be stock-holders in the company, and a majority of whom shall be citizens and residents of the State of New York, such trustees to be elected annually by ballot at a meeting of the stockholders of the said company held for that purpose, as set forth in article 1."

8. The whole of the 10,000 shares in the American company are held by and in the name of the appellant company in England with the exception of seven shares, one of which is held by each of the seven trustees or directors of the American company. The American company did not issue any prospectus.

9. The brewing trade and manufacture, on which the profits wholly depend, is carried on exclusively at Rochester, and the books of the brewery are kept on the premises at Rochester. The banking account of the brewery is also kept at Rochester.

10. It is the practice for the managers of the brewery, who are also the trustees of the American company, at the end of each financial year to send to the appellant company in London the accounts for the brewery shewing the result of the brewing business carried on at Rochester during the year. The directors of the appellant company then consider the accounts, and agree upon the amount which they think should be distributed out of the profits, if any. They communicate their decision to the American company, and state the rate of dividend which they think should be distributed by the American company. The American company then formally declare a dividend on the shares of their company. The trustees of the American company

have power by the articles of association to declare a dividend upon the shares of the American company. The directors of the appellant company, on hearing that the directors of the American company have declared a dividend, then declare a dividend of a similar value on the English shares. The American company does not issue any report or balance-sheet.

11. No dividend warrant is issued by the American company, but the amount of profit to be divided on the shares held by the English company is sent over in bulk, by telegram, so far as it is required for the English shareholders in the appellant company; such portion of the dividends as is required for certain American shareholders being, however, retained by the American company, and distributed there direct on behalf of the appellant company.

12. It was not disputed that the profits made by the brewing business at Rochester, New York, amounted to the sum assessed, and that the appellant company had been duly allowed the necessary expenses of administration, &c.

On the above facts, the appellants contended that they were entitled to be assessed under the fourth case of s. 100 of the statute 5 & 6 Vict. c. 35; or, in the alternative, that the assessment should be made under the fifth case, and that by reason of the decision of the House of Lords in *Colquhoun* v. *Brooks* (1) the assessment should be reduced to the amount actually received in England by the appellant company.

The commissioners found That the brewing business carried on at Rochester, United States of America, was in fact a trade carried on by and was the business of the appellant company, and therefore that the profits made were the profits of the appellant company; that the head and seat and directing power of the appellant company were at their registered office in the City of London; and the commissioners were of opinion that if on the facts set forth in this case the brewery and profits made were technically the property of the American company, the American company was formed for the purpose of being and was the agent of the appellant company.

The commissioners confirmed the assessment.

(1) 14 App. Cas. 493.

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Finlay, Q.C. (*Dicey, Q.C.*, and *A. M. Bremner*, with him), for the appellants. The appellant company has been assessed upon the whole profits of the company, including the portion of profits retained in America and distributed there amongst the American shareholders, whereas they ought to have been assessed only on the amount of profits actually received in England. The case is governed by the decision of the House of Lords in *Colquhoun* v. *Brooks*. (1) In *London Bank of Mexico and South America, Limited* v. *Apthorpe* (2), part of the company's business was carried on in England. That case is therefore distinguishable from the present. Here the business of the appellant company is wholly carried on abroad, and there is no receipt in England, either actual or constructive, of the profits which are retained in America to be distributed amongst the American shareholders. As was pointed out by Charles, J., in *London Bank of Mexico and South America* v. *Apthorpe* (3), the authority of *Cesena Sulphur Co.* v. *Nicholson* (4) and *Calcutta Jute Mills Co.* v. *Nicholson* (4), has been shaken by the decision in *Colquhoun* v. *Brooks*. (1) Those cases, therefore, ought not to be treated as binding. On the facts stated, the case is brought within the fourth or fifth cases in 5 & 6 Vict. c. 35, s. 100, Sched. D.

The Attorney General, (*Sir C. Russell, Q.C.*), (*Danckwerts*, with him), for the Crown. This assessment to the income tax was properly made upon the appellant company under 16 & 17 Vict. c. 34, s. 2, Sched. D. It is submitted that the profits on which the appellant company have been assessed, are not profits arising from any investment in foreign securities, or dividends on or interest from foreign securities, within case 4 of 5 & 6 Vict. c. 34, s. 100, Sched. D.; nor are they profits arising from "foreign possessions" within case 5, so as to make the company taxable only in respect of such portion as is actually received in England. At any rate, the authorities establish that, in order to bring the case within the words "foreign possessions," the trade or business must be carried on wholly abroad. The business of the appellant company is not so carried on. It is an English company,

(1) 19 Q. B. D. 400; 21 Q. B. D. 52; 14 App. Cas. 493.
(2) [1891] 1 Q. B. 383; 2 Q. B. 378.
(3) [1891] 1 Q. B. 383, at p. 388.
(4) 1 Ex. D. 428.

supported by English capital, and registered in England. The business is carried on in England in the sense of the real control and management being here. The directors of the American company are merely the creatures of the English directors. *Colquhoun* v. *Brooks* (1) is distinguishable. Brooks resided in England, and was a partner in an English firm, but he was also a partner in an entirely distinct business carried on abroad. The decision in that case only was that a person residing in England, and carrying on a business entirely abroad, is not liable to be taxed except on the profits actually received in this country. The decisions in *Cesena Sulphur Co.* v. *Nicholson* (2) and *Calcutta Jute Mills Co.* v. *Nicholson* (2), and *Imperial Continental Gas Association* v. *Nicholson* (3) cover this case, and ought to be followed. In *Colquhoun* v. *Brooks* (1), Lord Herschell (at p. 510) distinguishes the *Cesena Case* (2) on the ground that the head office, and therefore the principal place of business, of the companies whose income was under consideration, was in England, and the same ground of distinction exists here. *London Bank of Mexico and South America* v. *Apthorpe* (4) is also a decision in favour of the Crown in the present case, and was distinguished from *Colquhoun* v. *Brooks* (1) on the same ground. If this case comes within the fourth or fifth cases, it is submitted that the profits distributed in America were received in this country according to the principle applied in *Scottish Mortgage Co. of New Mexico* v. *McKelvie*. (5) They are payable to the English company, but for convenience are paid by their agents in America to certain shareholders who live there.

Finlay, Q.C., replied. The facts in *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (5) were entirely different. There the company was formed for the purpose of borrowing money in this country, and investing it abroad at higher rates of interest. The interest received by the company's agents in America was periodically brought into account in the books of the company kept at the head office at Glasgow, and an equivalent for the amount of that interest was retained by the managers in this

(1) 14 App. Cas. 493.
(2) 1 Ex. D. 428.
(3) 37 L. T. Rep. (N.S.) 717.
(4) [1891] 1 Q. B. 383; 2 Q. B. 378.
(5) 2 T. C. 165; 24 Sc. L. R. 87.

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country out of money borrowed by them on debentures. That case, therefore, does not touch this.

The Court intimated that they would postpone giving judgment until the arguments in the next case had been heard.

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The case of *Nobel Dynamite Trust Company, Limited* v. *Wyatt* was as follows:—

1. At a meeting of the Commissioners of Income Tax for the City of London held at the Guildhall Buildings, on March 5, 1891, the Nobel Dynamite Trust Company, Limited, appealed against an assessment of 58,562*l.* made upon them for the year ending April 5, 1891, under Case 1 of Sched. D of the Act 16 & 17 Vict. c. 34, s. 2.

2. The appellant company is an English company registered on October 18, 1886, under the Joint Stock Companies Acts, with memorandum and articles of association, and having a registered office at No. 220, Winchester House, Old Broad Street, in the city of London. The company is managed, and its affairs are controlled, by a board of directors who meet at the registered office, and have the sole right of control and disposal over the company's funds and property. The dividends declared by the company are declared by the board of directors in London, and no distinction is made with regard to dividend between shares held by English shareholders and those held by foreigners.

3. By the memorandum of association the objects for which the company is established are (inter alia):—

To acquire in exchange for fully paid-up shares in the company, or by purchase, subscription, or otherwise, the whole or any portion of the shares, stocks, debentures, bonus certificates, actions de jouissance, and other holding or interest or interests, of or in any companies, corporations, sociétés, associations or firms whose liability is limited, and which at present are or may hereafter be engaged or concerned or interested in the trades or industries of explosives, fuses, detonators, glycerine chemicals, or similar cognate trades and industries, and more particularly to acquire by exchange, purchase, subscription, or otherwise the shares, stocks, debentures, bonus certificates, actions de jouissance, and other interest or interests of or in the Nobel and other dynamite and explosives companies with limited

liability, which at present exist or hereafter may exist in Europe or elsewhere;

To superintend, manage, and take part in the management of the businesses of the companies, corporations, &c., in which the company may hold shares, stocks, or other interests; to make or do, or assist in making or doing, such arrangements or things as may be considered desirable with the view of causing the businesses of any such companies, corporations, sociétés, associations, or firms to be carried on economically and profitably, or of promoting the success thereof; to receive the moneys, dividends or other interests to which, as holders of such shares, stocks, &c., the company will become entitled; to vote at meetings and generally to exercise the rights, enjoy the privileges, and fulfil the obligations of share or debenture-holders or members in and of the said companies, corporations, sociétés, associations, or firms;

To manufacture, purchase, sell, and deal in explosives, &c., as therein provided;

To acquire in exchange for fully paid-up shares of the company or by purchase or otherwise the works, businesses, assets, and estates therein mentioned, and with sundry other subsidiary objects therein mentioned. The liability of the members is limited, and the capital of the company is 2,000,000*l.*, divided into 200,000 shares of 10*l.* each, of which 153,700 shall be deemed and held as fully paid-up, with powers to increase or reduce the capital and to issue and convert shares as therein mentioned.

4. This paragraph stated that the primary object of the company, as stated in the preliminary prospectus, was to acquire by exchange shares in six specified explosives companies at the prices mentioned therein, and that for some time past the shareholders of those companies had thought it desirable to establish a community of interest between the several companies by consolidating their interests, and they were of opinion that this object could be most conveniently attained by establishing the present trust company.

5. The appellant company does not carry on any manufacturing business, and does not buy or sell any materials or goods in the

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United Kingdom or elsewhere. The appellant company has no workshop or factory either in the United Kingdom or elsewhere.

6. The appellant company have acquired in pursuance of their powers, shares in the six following companies (hereinafter referred to as the subsidiary companies):—

(1.) In the Alliance Explosives Company of London;

(2.) In the Nobels Explosives Company of Glasgow;

(3.) In the Dynamit Actien-Gesselschaft of Hamburg;

(4.) In the Deutche Sprengstoff Actien Gesselschaft of Hamburg;

(5.) In the Dresdner Dynamit fabrik of Dresden;

(6.) In the Rheinische Dynamit fabrik of Opladen;

7. The receipts of the appellant company are chiefly derived from the shares held by them in the subsidiary companies.

8. As regards the Alliance Explosives Company of London and the Nobels Explosives Company of Glasgow, allowance by way of deduction has been made from the accounts in the assessment by reason of the income tax on the dividends due to the appellant company from these companies having been duly deducted and paid by these companies to the Crown; and no question arises on this appeal as to these dividends.

9. Each of the above-named German companies is, and has been ever since the formation thereof, a duly constituted corporation in accordance with the law of Germany, and carrying on business in that country, and each of them is, and always has been, managed by its own board of directors who control its affairs and declare its dividends.

10. At the hearing of the appeal the balance-sheet of the appellant company was produced, and evidence was taken to the effect that the shares in the subsidiary companies were purchased in furtherance of the objects for which the appellant company was formed and carried on business. Those shares are the property of the appellant company, who hold share-warrants to bearer for the same.

11. When the directors of the appellant company determine to divide any portion of the profits made by them, they do so by declaring a dividend in London payable on all the shares of the

appellant company. All moneys due to the appellant company, whether from the above-named German companies or from the English companies, are brought into the balance-sheet, which is issued in London, as profits actually made, and the dividend is declared generally out of all such profits, without making any distinction in the source from which the same arises. The establishment charges and expenses of administration of the appellant company are deducted in the profit and loss account from the gross profits made, and these expenses were allowed by the assessor as proper deductions from the gross profits made, in arriving at the assessable profits on which the assessment was made. The appellant company in their balance-sheets also deduct from their gross profits the establishment charges, expenses of administration, and otherwise as in the balance-sheets is shewn before the dividend is declared; nor is the dividend divided co-extensive with the sums received by way of profit.

12. A large number of shares in the appellant company are, however, held by foreigners resident in Germany and other foreign countries; and by direction of the board of directors of the appellant company the dividends due to the appellant company in respect of its shares in the four German corporations are paid into banks abroad. The same are then, by the direction of the board of the appellant company, applied in paying the dividend, when declared, to the foreign shareholders of the appellant company, and are not, nor is any part thereof, otherwise than constructively, remitted to or received in this country. On the contrary, a further sum is sent abroad by the appellant company to make up the amount required to pay the dividends due to the foreign shareholders. It was admitted on the part of the appellant company that the directors of the appellant company could have directed the amount of the dividends due to them upon the said shares to be remitted to this country, instead of being retained in Germany, but that it was, for the sake of convenience, distributed direct amongst the shareholders of the appellant company in the manner above referred to.

It was contended on behalf of the appellant company that they ought to be assessed under the fourth case of s. 100, Sched. D of 5 & 6 Vict. c. 35; or, in the alternative, under the

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fifth case thereof, and that, in either view, the amount of the dividend paid direct to the foreign shareholders in the appellant company was not chargeable with income tax by reason of the amount thereof not having been received in the United Kingdom by the appellant company, and they cited the case of *Colquhoun* v. *Brooks*. (1)

The commissioners found as a fact that the appellant company was a company carrying on a trade, adventure, or concern in the nature of trade, and they were of opinion that the assessment was properly made and confirmed the same accordingly.

Dicey, Q.C. (*Finlay, Q.C.*, and *A. M. Bremner*, with him), for the appellant company, contended that the portion of the profits retained in Germany, and paid there to the German shareholders in the English company, were not, either actually or constructively, received in this country; that those profits were interest arising from "foreign securities" within the fourth case, or were moneys arising from "foreign possessions" within the fifth case; that the business by which the profits were earned was wholly carried on in Germany, and, therefore, that this case also was governed by the decision of the House of Lords in *Colquhoun* v. *Brooks*. (1)

The Attorney General, (*Sir C. Russell, Q.C.*), (*Danckwerts* with him), for the Crown, relied again on *Scottish Mortgage Company of New Mexico* v. *McKelvie* (2), and distinguished *Colquhoun* v. *Brooks* (1) on the same ground as in the first case.

Dicey. Q.C., replied.

Cur. adv. vult.

1893. Aug. 12. The following judgments were delivered:—

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CAVE, J. This case raises a question which is one of fact only. The law on the subject has been settled by the decision of the House of Lords in *Colquhoun* v. *Brooks* (1); and, according to that decision, the income tax is chargeable upon all profits made in the United Kingdom. It is also chargeable upon all

(1) 14 App. Cas. 493. (2) 2 T. C. 165; 24 Sc. L. R. 87.

persons who live in the United Kingdom and are engaged in a trade carried on abroad, but with the limit in that case that the tax is to be charged only in respect to such profits as are actually brought into, and received in, the United Kingdom. That is the law as laid down in *Colquhoun* v. *Brooks* (1), and the subsequent case of *London Bank of Mexico and South America* v. *Apthorpe* (2) does not profess to modify or interfere in any way with the decision of the House of Lords; but, inasmuch as in *London Bank of Mexico and South America* v. *Apthorpe* (2) it was found as a fact that the business was carried on in England, though there were some transactions in it which took place abroad, the result was that the business was an English business, and the profits derived from it were taxable because the business was carried on in England. The question we have to decide here is more complicated. On the statement of the case it appears that a company was formed for the purpose of purchasing certain business properties in the United States of America. The prospectus indicated Rochester City and Monroe County in the State of New York as being the names of the town and county in which the operations of the company were to be carried on. Paragraph 9 of the case finds that the brewing trade and manufacture, on which the profits wholly depend, is carried on exclusively at Rochester, and the books of the brewery are kept upon the premises at Rochester. The banking account of the brewery is also kept at Rochester. Now the appellant company is an English company, and their registered office is in London. They there—in London—consider the accounts, and agree upon the amount (if any) which they think should be distributed out of the profits. But they have, for the purpose of carrying on the business, an American company, formed partly in order to comply with the requirements of the law of the United States, and partly because it is necessary to have some one on the spot who shall decide how the business is to be carried on. If the American company had not been formed in order to comply with the law of the United States, it would still be necessary to have some person in America to manage the business and direct how it was to be carried on. Except in a very distant way it could

(1) 14 App. Cas. 493. (2) [1891] 1 Q. B. 383.

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not, of course, be carried on by directions from England. It would be impossible that every order should be given, and every sale authorized, from England. It is absolutely necessary that there should be some one in America to manage the details of the business. It is, however, unnecessary to rely further on that, because, as I have said, paragraph 9 of the case finds that the trade and manufacture upon which the profits wholly depend is carried on exclusively at Rochester, so that quite clearly the business is a foreign business, and a foreign business within the interpretation placed on these words in *Colquhoun* v. *Brooks*. (1) It follows, therefore, that the appellant company is liable to be taxed only in respect of so much of the profit as is actually brought to, and received in, England. In my judgment, the case falls within the fifth case. The fifth case specifies divers ways in which profits may be received in England. I do not go through them one by one, because, in my judgment, none of them apply to such a case as this. Here, the amount of profits divided on the shares held by the English company is sent over in bulk, by telegraph, so far as it is required for the English shareholders in the appellant company, such portion of the dividend as is required for certain American shareholders in the appellant company being retained by the American company, and distributed direct in America on behalf of the appellant company. The profits are wholly received in Rochester. So much of those profits as is needed to pay the dividends to the English shareholders is sent over to England, and, undoubtedly, is received in this country in accordance with the requirements of the statute. So much of the profits as is required to pay the dividends to certain American shareholders—whether they are shareholders in the American company or in the English company is immaterial; they are American shareholders—is not sent to England, but is handed over to them in America, and, consequently, that portion of the profits never does come to England. I think it is impossible to say that it is constructively received there. It seems to me, therefore, that the contention of the appellants is correct, and that they ought to be taxed only on the profits which are sent over for division in England, and

(1) 14 App. Cas. 493.

ought not to be taxed on that portion of the profits which is retained in America and paid over to the shareholders there.

WRIGHT, J. In this case a British company was formed to acquire and work breweries in the United States. Inasmuch as by the local law the properties could not be held by the British company, an American company was formed, which, in the interests of the English company, is the owner of the property. All the shares of the American company except the necessary qualifications of the American directors or trustees, are held by the English company. The shares of the English company are held partly in England, partly in America. The supreme management and direction rests with the English directors. They are periodically informed of the estimated results of the business in America, and of the amount estimated to be available for dividend. They prepare balance-sheets, adding the English to the local expenses, and they declare such dividend as they think fit. The amount of the dividends for English shareholders in the English company is remitted to England. The amount required for American shareholders in the English company is retained and distributed in America; and the question is whether income tax is payable on the amount so retained and distributed in America. In my opinion, the case of *Colquhoun* v. *Brooks* (1) obliges us to hold that, notwithstanding the cases of *Cesena Sulphur Co.* v. *Nicholson*, and *Calcutta Jute Mills* v. *Same* (2), and of *Imperial Continental Gas Association* v. *Nicholson* (3), the profits of a business wholly carried on abroad are within the fifth case, although the owner of the business is resident here. Then, is this business carried on wholly in America? I think that for the present purpose a business is wholly carried on abroad if all the operations which earn the profit are done abroad, notwithstanding that the owner resident here exercises control over those operations, and ascertains and apportions the profits. The interest, therefore, of the English company in the American business must be regarded as a foreign possession, and so within the fifth case. There is another way in which the same conclusion

(1) 14 App. Cas. 493. (2) 1 Ex. D. 428.
(3) 37 L. T. Rep. (N.S.) 717.

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may be reached on different grounds. I think that in point of law whatever control is exercised by the English company is exercised by it as the holder of practically all the shares in the American company; and, if that is so, the English company cannot be properly said to carry on the business of the American company at all. The business of a company is not carried on by its shareholders, but by the company through its directors, although the shareholders in general meeting have the power of general control. If this view is correct, the right conclusion may be that the English company's interest is in the nature not of a trade, but of an investment in the American company, and so within the letter of the fifth case as a foreign possession. I should add that I think it is not within the fourth case. Shares in a company are not securities, but portions of its capital. If these conclusions are correct, the tax is payable only "on a sum not less than the full amount of the actual sums annually received in Great Britain, either (*a*) for remittances . . . . payable in Great Britain, or (*b*) property imported . . . . into Great Britain, or (*c*) from money or value received in Great Britain, and arising from property which shall not have been imported into Great Britain, or (*d*) from money or value so received on credit or on account in respect of such remittances, property, money, or value brought, or to be brought, into Great Britain"; and it remains to consider whether the dividends retained in America are within that limitation. It appears to me that, if the fourth case were applicable, these dividends ought in point of law to be regarded as received in England. For reasons of convenience, the money is not sent over; but it forms part of the profit dealt with and divided by the company here, and the effect of what is done is that a debt due and payable in England to the foreign shareholder is discharged by the money retained in America. That, I think, is equivalent to a receipt of the money here. Compare the case of the *Scottish Mortgage Company of New Mexico* v. *McKelvie* (1), decided by the Scotch Court of Exchequer in 1886. I think that it would be a strained construction of the language used to hold that the amount of these dividends can be regarded as "remittances from thence payable in Great

(1) 2 T. C. 165; 24 Sc. L. R. 87.

Britain," although in business remittances are, of course, constantly made by way of set-off or cancellation or exchange of debts. The dividends certainly are not "property imported into Great Britain." Nor, I think, can they be regarded as "value received in Great Britain arising from property not imported into Great Britain." Those words, I think, refer to the proceeds of sale or exchange of property, such as is ordinarily the subject of commercial importation, as distinguished from monetary remittances. The alternative (*d*) does not extend the subject-matter of the other alternatives, but only includes advances and credits in respect of the same kinds of receipt as those already dealt with. For these reasons, I think that the claim of the Crown fails.

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WRIGHT, J. Similar considerations apply to the case of the Nobel Dynamite Trust Company. I think that they do not carry on any concern in the nature of trade. Their business is the business of investing in the shares of various companies, English and foreign; and as regards the profit from the foreign shares, I think it falls within the fifth case. There is in this instance a further objection to the Crown's claim—viz., that the foreigners' dividends which are in question are, under the powers given by the articles of association of this company, payable abroad; so that it is difficult to see how dividends, which have not in fact come here, and do not discharge a debt primarily payable here, can in any sense be regarded as received here.

CAVE, J. As my brother Wright has said, this case involves very much the same considerations as the other, with this difference that the company does not carry on a manufacturing business at all; it merely invests the capital in buying shares in companies—to the number of about six—which may be called subsidiary companies. Two of them are companies which carry on their business and earn their profits in the United Kingdom, and on those two income tax has been charged and paid in the ordinary way. The other four do not carry on their business in the United Kingdom, but abroad; and with regard to them it

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cannot be said either that the companies themselves reside, or that their business is carried on and their profits received, in the United Kingdom. It is not so. Then the appellant company in question takes shares in those four companies. So far as the profits come over to the appellant company here, and are divided among their shareholders in this country, they are liable to income tax; but so far as the profits of the appellant company are paid, at their request, to foreign shareholders who live abroad, those profits are not received in this country, and, consequently, they are not liable to the tax in respect of them.

I agree, therefore, that the appellants must succeed in this case also.

Judgment for the appellants in both cases.

Solicitors for appellant company in each case: *Ashurst, Morris, Crisp & Co.*

Solicitor for Crown: *The Solicitor of Inland Revenue.*

W. A.

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[IN THE COURT OF APPEAL.]

THE ORIENTAL STEAMSHIP COMPANY, LIMITED *v.* TYLOR AND ANOTHER.

Ship—Charterparty—Advance Freight—Freight payable on signing Bills of Lading—Loss of Cargo before Bills of Lading signed—Liability of Charterer.

A cargo was shipped under a charterparty which contained the following clause: "The freight to be paid as follows—one-third on signing bills of lading, less 3 per cent. for interest, insurance, &c., and the remainder, on unloading, in cash." Bills of lading were to be signed within twenty-four hours after the cargo was on board. After the commencement of the voyage, and before bills of lading were signed, the vessel sank and the cargo was lost. The charterers thereupon refused to present bills of lading for signature, and the shipowner sued them for breach of the charterparty in so refusing:—

Held, that the loss of the cargo did not relieve the charterers from their liability to present bills of lading, and that the shipowner was entitled to recover damages equal to the amount of the advance freight.

APPEAL from a judgment entered for the defendants at the trial, without a jury, before Pollock, B.

This was an action to recover a sum of 374*l.* for advance freight

of coal shipped at Cardiff by the defendants on board the plaintiffs' steamship *Fidele Primavesi*, pursuant to a charterparty dated July 25, 1892, and in the alternative for breach of the charterparty by the defendants in neglecting to present bills of lading. The defendants denied that it was their duty to present bills of lading, and they counter-claimed for expenses incurred by them and for the cost of bunker coal supplied by them, for which the owners, by the terms of the charterparty, were liable to pay, and for damages for loss on the cargo through the negligence of the defendants.

By the charterparty the defendants, who were named therein as agents for the freighter, but who signed without qualification, undertook to provide for shipment a cargo of steam-coal. The charterparty provided that the vessel, after being loaded, should proceed to Barcelona to deliver, on being paid freight on the bill of lading quantity less 3 per cent., in lieu of weighing, at the rate of 11*s.* 3*d.* per ton. "The freight to be paid as follows—one-third on signing bills of lading, less 3 per cent. for interest, insurance, &c., and the remainder on unloading, in cash. . . ." The ship was to take on board from the shippers at loading port bunker coal, the quantity to be indorsed on bills of lading for ship's use, the owners paying a stipulated price, and "captain or agents to sign bills of lading for weight put on board as presented to him according to the railway or dock company's weight without prejudice to the tenor of this charterparty or without any alteration within twenty-four hours after the coals are on board or to pay 20*l.* per day for each day's delay. . . . All liability of Tylor & Lewis (the defendants) ceases as soon as they have shipped the cargo and paid advance of freight and loading demurrage (if any) notwithstanding it may have been sold at a price cost freight and insurance, the owner to have a lien on cargo for freight dead freight and demurrage which he is to exercise." By another clause, "Trimming charges cost of bunker coals despatch-money charterers' share of brokerage and difference of re-charter (if any) are payable on signing bills of lading ship lost or not lost."

The loading was completed at 5.30 P.M. on August 11, and the captain went to the charterers' office to get bills of lading.

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He got bills of lading for presentation at the Spanish Consulate specifying the whole amount of coal loaded, but did not get the mercantile bills of lading, as the proportion of coal in the different holds of the ship was not then known. At 6 P.M. the ship left the loading-quay, but she sank before reaching the dock gates by reason of a hole in her side caused by fouling her anchor. For the purpose of the trial it was admitted that the accident was due to the negligence of the owners' servants. The cargo being lost, the charterers declined to present bills of lading or to pay the advance freight, and this action was brought. The learned judge held, that as bills of lading had not been signed the plaintiffs could not recover advance freight, and he gave judgment for the defendants on the plaintiffs' claim, and also on the counter-claim in respect of the price of the bunker coal. The plaintiffs appealed.

Bigham, Q.C., and *Boyd*, for the plaintiffs, in support of the appeal. The bills of lading are to be presented by the person who wants them signed—that is, by the shippers. Under the charterparty it was still their duty to present them, although the ship had sunk. If the plaintiffs were entitled to be paid advance freight, the defendants could not defeat the claim by refusing to perform the condition precedent to present bills of lading. In *Smith, Hill & Co.* v. *Pyman, Bell & Co.* (1) there was no absolute obligation to pay advance freight, but only to pay it if required; while in the present case there is no such condition. It is admitted that if the plaintiffs recover the defendants are entitled to deduct the cost of the bunker coal; but the judgment was wrong in deciding against the plaintiffs and yet giving the defendants judgment on their counter-claim.

J. Eldon Bankes, (*Pyke, Q.C.*, with him), for the defendants. There was no obligation at all on the defendants to present bills of lading for signature; but, even if there was such an obligation, they had a reasonable time up to twenty-four hours in which to do so; and as before that time the ship had gone down, and bills of lading had become useless as mercantile documents, their obligation ceased.

(1) [1891] 1 Q. B. 742.

LORD ESHER, M.R. In this case the action is by the shipowner against the charterer for the breach, as he says, of the charterparty. Now, the only contract between the shipowner and the charterer is the charterparty, and as between the shipowner and the charterer the bill of lading is no part of the charterparty contract, and is nothing but a receipt for the goods put on board. The bill of lading which is given by the shipowner, according to a charterparty between him and the charterer, does by the mercantile law contain the terms of the contract by which the charterer is enabled to hand over or to assign to an assignee of a bill of lading. As between the shipowner and the assignee of a bill of lading, the bill of lading contains the terms of carriage—the terms of the contract; but as between the shipowner and the charterer the bill of lading given under the charterparty is no part of the charterparty contract. The terms of the bill of lading may, by reference to it in the charterparty, be written into the charterparty so as to become part of the charterparty contract. That is what has happened in this case. Some of the terms of the bill of lading here are by reference in the charterparty to be read into the charterparty, and become part of it.

Now, the terms of the charterparty are that the goods are to be shipped at Cardiff, with certain terms as to the mode of loading the goods on board, and the charterparty freight is to be 11*s.* 3*d.* per ton upon the bill of lading weight. That, therefore, makes the freight to be upon the bill of lading weight, and obliges one to read that into the charterparty; and you cannot here get at the amount of freight which is to be paid until the bills of lading are signed. That being so, if there were nothing about advanced freight in this charterparty, how would the case stand? There would be no charterparty freight earned until the ship arrived at Barcelona and delivered the cargo. When the ship did arrive at Barcelona, the freight to which the captain would be entitled would depend upon the amount in the bill of lading. Therefore, even although there were nothing here about advanced freight, it would be necessary in order to carry out the charterparty that there should be a bill of lading signed by the captain. Now, what bill of lading is the captain called upon to sign?

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The captain has undertaken to sign a bill of lading under the charterparty. He cannot draw up the bill of lading in any terms that he likes and sign it. He is to sign the bill of lading presented to him if presented to him within the terms of the charterparty; he is not called upon to sign a bill of lading which is inconsistent with the charterparty; he is bound to sign a bill of lading which is according to the charterparty. What bill of lading is that which is to be signed according to the charterparty? The bill of lading is to be used by the shipper—that is, the charterer, because the charterer is the shipper as between the shipowner and the charterer. The bill of lading is to be used by the charterer by being assignable to any one for money to whom he chooses to assign it. It is for him to name the consignee under the bill of lading. Under this charterparty he seems to have the liberty to present one bill of lading for the whole cargo, or several bills of lading respecting parts of the cargo. That is his choice; he is to determine that, and if he presents bills of lading which, taken altogether, amount to the cargo which is on board, the captain is bound to sign them. Therefore, the choice of the consignee and the choice of whether it should be one bill of lading or several, being both of them in favour of the charterer and to be determined by him, would shew that he has to present the bills of lading. There is another matter here which is conclusive to shew that the charterer is to present the bills of lading. The charterer is the person who here loads coals on board the ship, and brings the coal from the coalowner. Here, at Cardiff, therefore, he is the person who bargains for the coals and has them brought down from the pits to the ship. Under this charterparty the weights are to be determined by the weights at the colliery or at the railway. The captain is not entitled under this charterparty to see to the weighing of the coals when delivered alongside his ship. In ordinary cases of delivery of a cargo according to the tonnage, the weight of the cargo, if it is shipped by weight, is determined by the joint action at the ship's side of the shipowner and the shipper. But in this case it is to be the act of the shipper alone; and the shipowner here or the captain has undertaken not to insist upon the right of weighing

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at the ship's side; he is to take the weights from the colliery. Therefore, that being in the sole knowledge and control of the shipper makes it clear to me that, upon the true construction of this charterparty, the first step with regard to the bill of lading is to be taken by the charterer, and he has bound himself to present a bill of lading for the captain or the agent to sign.

Now, with regard to what time is the signing of the bill of lading to be determined? What is the time at which, or from which, you are to calculate the necessity or the obligation to sign the bill of lading? It is not from the sailing of the ship; it is from the loading of the cargo. No captain has authority to sign a bill of lading unless there is cargo on board, and he has only authority to sign for the cargo which is on board. But when there is a cargo on board, what is the time within which the bills of lading are to be signed? The bills of lading are almost invariably signed before the ship sails. Take an ordinary charter, where there are not the words "or agent" in it, where the bills of lading are to be signed by the captain only: is it not elementary to say that those bills of lading are to be signed before the ship sails? It is obvious, in almost every case, the bill of lading is signed before the ship sails, and the time from which you are to determine the obligation as to the time of signing the bill of lading is from the time of loading the cargo. Therefore, the time for the signing of these bills of lading is to be calculated from the time of the loading on board.

Now, the ship being loaded is to sail, and it is from the time of the loading that you must calculate the time for sailing. The reasonable time for the sailing of the ship when she is loaded is that she should sail at once; she is not allowed to remain one or two or three tides after she is ready to sail. The time of her sailing may make the whole difference to the shipper with regard to the insurance of his goods, because the voyage will commence from the time when the ship breaks the ground, and if you do not break the ground and sail the ship at the proper time that may alter the incidents of the voyage. Therefore that makes it the duty of the captain, who has undertaken to sail on the loading of the ship, to sail at once. It is said

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"within a reasonable time," but that means within a reasonable time with regard to the weather and the possibility of moving his ship. If therefore there were no obligation at all as to advanced freight here, it seems to me that these bills of lading ought to have been presented before the ship sailed. But here you have freight to be paid as follows—one-third on signing bills of lading, less 3 per cent. for interest, insurance, &c., and one-third of the freight is to be payable in advance, because any freight which is payable before the arrival of the ship at the port of destination is advanced freight. Advanced freight need not be freight payable before the ship sails, because if the freight is to be payable three days after the ship sails that is advanced freight: it is advanced beyond the time of the ship's arrival at the port of destination. Now, as to the advanced freight here, we must look at the bill of lading in order to get at the amount, and it is "one-third on signing bills of lading, less 3 per cent. for interest and insurance." From the moment when it becomes payable advanced freight cannot be insured by the shipowner. The freight, according to the contract, is then due to him by virtue of the contract at that time and at that moment. That does not depend upon whether the ship arrives or not: it is payable at that moment. It is money payable on contract, and on contract not depending upon any vicissitude of the voyage at all. In that case the shipowner cannot insure it; but the person who has paid it, or become liable to pay it, can insure it. Now, here you find that the person who has to present the bill of lading, and who has to pay the advanced freight on the signing of the bill of lading, points out the time at which he really intends and has obliged himself to present the bill of lading by saying that it is at a time when he can insure it. Of course, he can insure it at any time while it is at risk; but he cannot insure it after the ship is lost, because then it is no longer at risk. That shews to my mind clearly that here it was intended between the parties that this advanced freight should be payable at a time when he might insure—that is, at the earliest time. All that comes to this, then, that upon this charterparty he was to present the bills of lading, and he was to present them almost immediately after the ship was loaded, and

therefore the sailing of the ship and the loss of the ship have nothing whatever to do with the matter.

Now, he did not present the bills of lading at the time when he ought to have done so. What is the result of that to the shipowner? I think that he cannot recover the advanced freight until the bills of lading are signed; that is a condition precedent to his obtaining the advanced freight as freight; but then he was entitled to have the bills of lading signed at a time to enable him to obtain the advanced freight. The charterer here ought to have presented that bill of lading almost immediately. He did not present it at all, but he says: "I, who ought to have presented it almost immediately, did not present it until the ship was lost, and then when the ship was lost I was not bound to present it at all"—that is to say, by breaking the contract and waiting until something has happened he gets rid of the contract. That seems to me to be an impossible position, and, therefore, the loss of the ship here had nothing to do with the matter.

He is liable because he did not in due time present the bill of lading, and by not presenting it at all he has prevented the shipowner from obtaining the advanced freight as freight. He has broken his contract to present the bill of lading, and, inasmuch as he has prevented the shipowner by the manner of his breach from recovering the advanced freight at all as freight, the amount of that advanced freight is the measure of the damage to which the shipowner is entitled.

I think, therefore, that this action by the shipowner against the charterer in respect of this advanced freight is to be maintained upon the footing that the charterer broke his contract by not presenting the bill of lading, and that the measure of damage in this case is the amount of the advanced freight.

It is said that the shipowner would be in this case bound to prove that he was ready and willing to sign, or that his captain or agent was ready and willing to sign, the bill of lading, and it was said he was not because two of his agents have written backwards and forwards to each other at particular times saying that the agent was not to sign the bill of lading. But that, being not a communication to the defendants at all, amounts to nothing; it does not excuse them for not presenting the bill of lading. If

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they had presented the bills of lading there is nothing to shew but that upon their so presenting them the agent would not have done that which would have been within his duty, and would not have signed them.

I think, therefore, this action is maintainable by the plaintiff, and if it was maintainable by the plaintiff, as I understand the parties, there is no question raised about counter-claim at all, either as a set-off or counter-claim. I think this appeal should be allowed.

BOWEN, L.J. I am of the same opinion. It seems to me to be clear upon this charterparty that it was the duty of the charterers to present bills of lading for signature by the captain or agents, and, indeed, this was hardly disputed by the plaintiffs; but it was said that, as the ship was lost within the time for presenting the bills of lading, it was then too late to present them, and that the obligation to present them ceased. It was argued that, as it was then too late for the charterers to assign the bills of lading, the obligation on their part to present them ceased. Whether that is so depends upon the terms of the contract between the parties. To my mind, the true interpretation of this charterparty is to be found by keeping in one's mind the proper functions of a charterparty and of a bill of lading respectively. Where there is a charterparty, then, as between the charterers and shipowners, the terms of the contract of carriage are to be gathered from it. Where there is a bill of lading as well, its primary use is simply to act as a receipt for the goods shipped on board for carriage under the contract of carriage contained in the charterparty. The charterparty may make further use of the bill of lading, and it may be part of the contract that the bill of lading may serve some further purpose. Looking at this particular charterparty, it is plain that the bill of lading is intended to serve some further purposes, and it is by seeing what those purposes are that we get an answer to the question before us. In the first place, the bill of lading is to fix the weight upon which freight is to be paid. Freight is to be paid on the bill of lading quantity, and the captain or agent is to sign bills of lading for weight put on board, as presented to him according to railway or dock company's weight.

Thus the railway or dock company's weight fixes the freight to be paid under the charterparty. Further, the signing of the bills of lading was the moment designated as the time at which certain rights were to come into existence, or cease to exist. The advance freight was payable on signing bills of lading. Therefore, the signing of the bills of lading was the moment which was designated as the time when the advance freight was payable. So, also, many other payments were to be made on signing bills of lading. Lastly, the cesser clause was to come into operation upon the shipment of the cargo and payment of advance freight and loading demurrage. Accordingly, we see that the signing of the bills of lading determines the time when certain rights arise and when certain rights cease. We must, therefore, see when the captain was bound under this charterparty to sign bills of lading. It is plain that the bills of lading cannot be signed until they are properly made out and presented to the captain or agent in accordance with the charterparty. The first step must be taken by the charterers. It is inconceivable that the rights which are given to the shipowner on signing bills of lading can be delayed by the act of the charterers in not presenting bills of lading for signature. It is obvious that there must be an implied term in the charterparty, in order to make the contract effectual, that the charterers should present bills of lading to the captain or agent for signature within a reasonable time, so as to give effect to the rights of the shipowner. The case comes within the well-known rule that where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual. That being so, the only question that remains is, can the charterers say that the obligation to present bills of lading ceases if the ship is lost? In my opinion no such excuse for the non-performance of that obligation can be properly put forward, for the loss of the ship is not a circumstance which affects, as between these parties, the validity or commercial importance of the bills of lading. The bills of lading do not contain the contract to carry. They are the evidence of the

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receipt of the goods; and in this case they are something more than that, because their signature is made the event upon which the shipowner is to be entitled to enforce certain of his rights. They are part of the machinery upon which the rights of the parties depend. That distinguishes this case from *Smith, Hill & Co.* v. *Pyman, Bell & Co.* (1) There the advance freight was to be paid "if required." Those words are absent from the present charterparty. In that case there was no absolute right to the advance freight, but only an option given to the shipowner to require payment of the advance freight. The Court accordingly held that the loss of the ship before the requirement was made determined the right to demand advance freight, inasmuch as the charterer could not insure the advance freight until he became liable to pay it, and the advance freight was not payable until the option was exercised by the shipowner. Therefore, it was held that the requirement must be made at a time when the charterers could insure the advance freight, and that it was too late to do so when the ship was lost. But here there is a right, conditional, no doubt, on the signing bills of lading, but, subject to that, an absolute right, to be paid advance freight, which is never lost so long as the bills of lading can be presented for signature and signed. The loss of the ship did not prevent the bills of lading being presented and signed. The charterers have broken the implied contract to present bills of lading, and, though the advance freight cannot be recovered as such, the measure of damages for breach of that contract is in this case the amount of the advance freight. The appeal must accordingly be allowed.

KAY, L.J. I am of the same opinion. This case differs materially from *Smith, Hill & Co.* v. *Pyman, Bell & Co.* (1) In that case the advance was only payable "if required." There are no such words in this charterparty. In that case the requirement was not made until after the ship had sailed and she and her cargo had been lost. It was held that the option to require payment of advance freight could not be exercised after the loss, as the charterer could not then insure the freight. The clause in the present charterparty, which is said to bring the

(1) [1891] 1 Q. B. 742.

case within *Smith, Hill & Co.* v. *Pyman, Bell & Co.* (1), is that freight is to be paid "one-third on signing bills of lading, less 3 per cent. for interest, insurance, &c., and the remainder on unloading, in cash." Assuming that the clause is conditional, it is only conditional in this sense, that the advance freight is not payable unless the bills of lading are presented and signed. Upon looking further into the charterparty, it is clear that the charterers are the persons who are to present the bills of lading for signature. The charterparty provides that the "captain or agents to sign bills of lading for weight put on board as presented to him according to the railway or dock company's weight." There is no express contract by the charterers to present the bills of lading to the captain or agents; but I think, in order to give the charterparty its true effect, we must imply a contract by the charterers to present bills of lading in accordance with the tenor of the charterparty to the captain or agents to enable the captain by signing them to create the occasion upon which the advance freight will be payable. The question then is, whether the charterers were excused from their default in presenting bills of lading by reason of the loss of the ship. In my opinion the loss of the ship did not absolve them from presenting bills of lading to the captain for the purpose of enabling him to create the occasion upon which the advance freight is payable. There was an absolute right to payment of advance freight on presentation and signing of the bills of lading. That makes the whole difference between this case and *Smith, Hill & Co.* v. *Pyman, Bell & Co.* (1) The charterers refused to fulfil their implied contract to present bills of lading for signature, and, owing solely to their default, the condition upon which the advance freight would become payable was not performed. Damages can be recovered for the breach of that implied contract, and the measure of those damages is the amount of the advance freight.

Appeal allowed.

Solicitors for plaintiffs: *W. A. Crump & Son.*

Solicitors for defendants: *Ince, Colt, & Ince, for Ingledew & Sons, Cardiff.*

(1) [1891] 1 Q. B. 742.

A. M.

1893
July 31.

THE QUEEN *v.* HUGHES AND OTHERS.

Licensing Acts—Licence—Change of Occupation—Removal of Licence-holder—Application by New Tenant—Notice of Application—Transfer—9 *Geo.* 4, *c.* 61, *ss.* 4, 14—35 & 36 *Vict. c.* 94, *s.* 40, *sub-s.* 2; *s.* 74.

Sect. 40, sub-s. 2, of the Licensing Act, 1872, which requires fourteen days' notice of an application for a transfer of a licence to be given by the person intending to apply for the transfer, does not apply to an application, under s. 14 of the Licensing Act, 1828, by a new tenant or occupier of a licensed house for a licence where the licence-holder has removed from or yielded up possession of the house during the currency of the licence.

ORDER NISI for a mandamus to justices of Liverpool to hear and determine an application by Mary Donellan for an alehouse licence. From the affidavits filed it appeared that the licence-holder, one William Wyatt, who managed the house for a brewery company, left the premises and gave up possession of them to the owner on May 12, 1893, and on May 19 the applicant entered into possession as manageress for the company. The premises remained closed for a time, no proceedings having been taken to obtain a transfer of the licence; but on June 19 notice was given by the applicant of her intention to apply at the next special sessions on June 29 (the earliest date on which the application could be made) for a licence under s. 14 of the Licensing Act, 1828, on the ground that the occupier of the house had removed therefrom and yielded and given up possession of the premises. The justices refused the application on the ground that it was really an application for a transfer, and that the notice of the application was bad, not having been given fourteen days before the special sessions, as required by s. 40 of the Licensing Act, 1872, and on the further ground that, if that section did not apply, they in the exercise of their discretion held the notice to be insufficient. (1)

(1) By 9 Geo. 4, c. 61, s. 4, power is given to justices to hold special sessions at which it shall be lawful for them "in the cases and in the manner and for the time hereinafter directed to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns as they shall . . . . deem fit and proper persons."

By s. 11 (repealed by the Licensing Act, 1872), a licence-holder had to give a five days' notice of his intention to apply for a transfer.

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Channell, Q.C., and *J. Paterson*, shewed cause against the rule. The notice was insufficient. Sects. 4 and 14 of the Act of 1828 must be read together, and s. 14 sets out the various circumstances in which the justices can act under the powers given to them by s. 4. Those sections being read together, the definition of transfer given by s. 74 of the Act of 1872 is applicable (inter alia) to s. 14 of the earlier Act, which really deals with indirect modes of transfer, and the fourteen days' notice required by s. 40, sub-s. 2, of the Act of 1872 to be given of all applications for transfers is necessary in applications under s. 14 of the Act of 1828. The preliminary words of s. 40, "Every person intending to apply for a new licence, or to apply for the transfer of a licence, shall publish notice of such application as follows," shew that the section was intended to apply to all cases except renewals.

Even if s. 40 is not applicable, the justices contend that they could require fourteen days' notice as being a sufficient notice.

[CAVE, J. There is nothing in the Act to authorize such a requirement.]

Poland, Q.C., and *McConnell*, in support of the rule, were not called upon.

CAVE, J. I am of opinion that this rule must be made absolute. The case seems a clear one. The Act of 1828 is a well-known Act, and s. 4 contains the general provision for the

By s. 14: "If any person duly licensed under this Act shall before the expiration of such licence . . . . remove from or yield up the possession of the house specified in such licence . . . . it shall be lawful for the justices assembled as aforesaid at a special session . . . . to grant to . . . . any new tenant or occupier of any house having so become unoccupied . . . . a licence to sell exciseable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging." No provision is made by the section for the giving of a notice of such application.

By 35 & 36 Vict. c. 94, s. 40, sub-s. 2, every person intending to apply for the transfer of a licence is required to give fourteen days' notice of his intention to transfer the same, specifying in his notice the name, residence, and trade of the intended transferee.

By s. 74, which assigns to certain expressions certain meanings, if not inconsistent with the context, "transfer of a licence" is defined to mean a transfer made in special sessions in exercise of the power granted to justices by s. 4 of 9 Geo. 4, c. 61.

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appointment of special sessions for the transfer of licences. Then come s. 10, which provided for the notice to be given on an application for a new licence, and s. 11, which prescribed five days' notice of an application for a transfer to be given by the existing tenant, the transferor; these two sections were repealed by the Licensing Act, 1872. The next section to notice is s. 14 of the Act of 1828, which deals with a variety of contingencies, and provides (inter alia) that where a licensed person removes from or yields up possession of licensed premises, or omits or neglects to apply for a renewal, the new tenant or occupier of the house which has so become unoccupied may apply to justices at a special sessions for a licence. It is remarkable that the word "transfer" is not used in this section; the justices are in the cases specified empowered to "grant" a licence to the applicant. We next come to the Licensing Act, 1872, which by s. 40 provides for the notice to be given of applications for new licences and transfers—in the latter case fourteen days' notice must be given under sub-s. 2, and it must be given by the applicant, the intending transferor. It has been contended to-day that that section applies to applications under s. 14 of the Act of 1828; but I am of a contrary opinion—it takes the place of the repealed ss. 10 and 11, but s. 14 is untouched by it. It is urged that it deals with transfers, and that by s. 74 of the Licensing Act, 1872, the transfer of a licence means a transfer made in special sessions under s. 4 of the Act of 1828, that s. 4 must be read with s. 14, and that licences granted under s. 14 are but an indirect form of transfer. I am not satisfied, however, that the definition clause includes licences under s. 14 of the Act of 1828; but, even assuming that it did, that would not necessarily make s. 40 of the Act of 1872 applicable, for s. 74 only defines the meaning of certain expressions, "if not inconsistent with the context"; and it is quite clear to my mind that the transfer dealt with by s. 40 does not include licences granted under s. 14. There is another distinction between the sections which may be pointed out: s. 40, sub-s. 2, of the Act of 1872 provides for a notice to be given by the transferor, while the application under s. 14 of the Act of 1828 is made by the new tenant; it is quite obvious, therefore, that the

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word "transfer" in s. 40 is not to be applied to everything that can by a stretch of language be called a transfer, and certainly cannot have any application to s. 14, for the one section deals with an application by the transferor, the other with an application by the incoming tenant, whom, for the purpose of pointing out this distinction, I may call the transferee.

In the present case the application purported to be made under s. 14 of the earlier Act; but the justices refused to grant a licence on the ground that fourteen days' notice had not been given. The only statutory enactment requiring a fourteen days' notice is s. 40 of the Act of 1872; and that section is inapplicable to s. 14 of the Act of 1828. The only notice required by s. 14 is where the premises for which the licence is required have not been previously used for a public-house, in which case certain very stringent requirements have to be complied with; and the fact that in that special case a notice is specifically required by s. 14 is to my mind a strong point in favour of the applicant. What happens in the case under s. 14 in which notice of the application is requisite? Does s. 40 apply, or impliedly repeal the provision of s. 14 on that point? It is clear that it does not, and that s. 40, sub-s. 2, is confined to the case of an application for transfer by the outgoing tenant, and has no application at all to s. 14. The justices were therefore wrong in their assumption that the case was governed by s. 40 of the Act of 1872, and the mandamus must go.

WRIGHT, J., concurred.

Order absolute.

Solicitors: *F. Venn & Co., for Atkinson, Town Clerk, Liverpool; Leggatt, Rubinstein & Co., for H. F. Neale, Liverpool.*

W. J. B.

C. A.
1893
Aug. 10.

[IN THE COURT OF APPEAL.]

HARRIS *v.* BEAUCHAMP BROTHERS.

Practice—Action against Firm—Infant Partner—Judgment against Firm—Execution against Partnership Property—Order XLVIII. *a, rr.* 1, 8.

The fact that one of the members of a partnership, which is sued in the firm name, is an infant, does not prevent judgment being obtained against the firm and execution from issuing thereon against the property of the partnership.

APPEAL from an order of the Queen's Bench Division, affirming an order made at chambers under Order XIV., r. 1.

The action was brought against the defendants in the firm name of Beauchamp Brothers to recover on a cheque and for goods sold. It appeared that the firm consisted of two brothers, one of whom, Gilbert Beauchamp, was a minor who appeared by a guardian ad litem. An order to enter judgment against the firm was obtained under Order XIV., r. 1, against which the defendants appealed. The Court (Cave and Wright, JJ.) dismissed the appeal, but added a term to the order that execution should not issue "against the separate property of Gilbert Walter Beauchamp (infant) or against his share (if any) in the partnership profits."

The defendants appealed.

Herbert Reed, Q.C., and *Carrington*, for the defendants. There ought to be unconditional leave to defend. If the plaintiff avails himself of the procedure under Order XLVIII. A, and sues the defendants by their firm name, he can get no greater benefit than if he sued them nominatim. The order contains rules of procedure and does not alter the rights of the parties. The infant may be a partner, but is not liable to trade debts. This is an attempt to make him liable, for, as Lindley, L.J., pointed out in *Western National Bank of City of New York* v. *Perez, Triana & Co.* (1), "when a firm's name is used it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and

(1) [1891] 1 Q. B. 304, at p. 314.

a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names." [They cited also *Jackson* v. *Litchfield* (1) and *Heinemann & Co.* v. *Hale & Co.* (2)]

Channell, Q.C., and *Wedderburn*, were not called on.

LORD ESHER, M.R. It seems to me the points which have been put are bad. Order XLVIII. A, r. 1, says that any two or more persons carrying on business as a firm may be sued in the name of the firm. If the action is against the firm in the firm name, and there is to be a judgment, it has to be against the firm in the firm name. That is not an ordinary judgment upon which execution will issue as a matter of course against the goods of each of the partners. Under rule 8 execution may issue, against any property of the partnership within the jurisdiction: against any person who has appeared in his own name, or who has admitted on the pleadings that he is, or who has been adjudged to be a partner: or against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. If it is sought to issue execution against any other person as being a member of the firm, the leave of the Court must be obtained and there may be an inquiry as to his liability. If it turns out that he ought not to be made liable, execution will not issue against him personally; but how that can affect the execution against the partnership property I cannot imagine. The action is brought for what is admittedly a firm debt, and judgment has been obtained upon it, and can be executed against the partnership property.

I think there is no colour for this appeal.

BOWEN, L.J. The judgment is against the firm. It is necessarily against the firm, because the action is brought against the firm. The judgment against the firm is not a judgment in the ordinary sense against the infant, because the infant is not a person who has appeared in his own name under Order XLVIII. A, r. 8 (*b*), since he appears by a guardian ad litem under a previous rule; and infants, therefore, under this very rule are protected

(1) 8 Q. B. D. 474. (2) [1891] 2 Q. B. 83.

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against execution issuing against their property, even although judgment is obtained against the firm. But that the judgment should go against the firm property seems to me to be obvious justice, and it is following the rule. I know no law of this country which prevents partnership debts being paid out of partnership assets because one of the partners happens to be, without the knowledge of the creditor, an infant. Were it otherwise, as has been pointed out more than once during the argument, every firm might escape its creditors' claims by having an infant added to the number of partners. No one would know in such a case whether to sue the firm or not, and if they were once unfortunate enough to sue the firm, they never could get judgment which could be executed against anybody.

KAY, L.J. I am entirely of the same opinion. The order of the Court is very carefully worded. Indeed, I am not quite sure that the care has not gone a little too far. It is ordered that execution is not to issue against the separate property of Gilbert Water Beauchamp (infant), and it continues, "or against his share (if any) in the partnership profits."

Order XLVIII. A, and the rules under it, are clearly meant to apply to a different form of procedure from that which was in use before such order was made. Formerly it was necessary to find out who were the individual members of the partnership, and to sue them in their names, and they could not be sued in the name of the firm. That was found extremely inconvenient; for, amongst others, this obvious reason, that very often you could not find out who were the members of the partnership firm.

It seems to me that the meaning of this rule is beyond question. A plaintiff may sue the partnership in the firm name without naming any one individual partner as defendant to the action. When that has been done, the only judgment that can be obtained is one against the firm, in the name of the firm, and then the 8th rule says what is to be done under a judgment of that kind. In the first place, execution may issue against the partnership property, and it has been decided in *Lysaght* v. *Clark & Co.* (1) that judgment may be obtained against a firm

(1) [1891] 1 Q. B. 552.

although only one partner appears and the other partners do not appear at all. Now, it has been suggested that the rules are only intended to guide practice and procedure, and are not intended to alter the rights of the parties. But I have yet to learn that where an infant is a partner, and the partnership has to be dissolved or dealt with in any form of action or in bankruptcy, that the partnership assets would not be liable to pay the partnership debts. In any such case it would be ordered that the partnership debts should be paid out of the partnership assets; and, therefore, in that respect the rule does not alter any right.

I think the appeal fails, and must be dismissed with costs.

Appeal dismissed. (1)

Solicitors for plaintiff: *Godfrey & Webb.*

Solicitors for defendants: *Harper & Badcock.*

(1) The plaintiff did not appeal against the limitation in the order of the Queen's Bench Division.

A. M.

END OF VOL. II.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1894, will be as follows :—

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[1894] 1 Ch. [1894] 2 Ch. [1894] 3 Ch.

In the Second Series,
[1894] 1 Q. B. [1894] 2 Q. B. [1894] P.

In the Third Series,
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BANKRUPTCY.—*Act of Bankruptcy—Notice of suspension of Payment of Debts—Notice "without Prejudice"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).] A written notice sent by a debtor to one of his creditors that he has suspended, or is about to suspend, payment of his debts, though expressed to be written "without prejudice," is admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition. IN RE DAINTREY. EX PARTE HOLT - - - - - - 116

2. —— *Bankruptcy Notice—Married Woman trading separately—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1886, *r.* 136; *Appendix, Form No.* 6—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.] A bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, cannot be issued against a married woman who is carrying on a trade separately from her husband, and against whom a creditor has recovered a judgment in the form settled by the Court of Appeal in *Scott* v. *Morley* (20 Q. B. D. 120). IN RE LYNES. EX PARTE LESTER & CO. [C. A. 113

3. —— *Deed of Arrangement—Board of Trade—Accounts of Trustee—Retrospective Effect of Statute—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 25—*Deeds of Arrangement Rules*, 1890, *rr.* 7, 16—*Appendix to Rules, Forms* 2, 3, 6.] By the Bankruptcy Act, 1890, s. 25, sub-s. 2 (*b*): "Every trustee under any deed of arrangement, as defined by s. 4 of the Deeds of Arrangement Act, 1887, shall, within thirty days of the 1st of January in each year, transmit to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee, in the prescribed form, and verified in the prescribed manner." The Act came into operation on January 1, 1891:—*Held*, that this enactment either does not apply at all to deeds of arrangement executed before January 1, 1891, or that, if it does apply to such deeds, it only requires the trustee to furnish accounts of receipts and payments which took place subsequently to January 1, 1891. IN RE NORMAN. EX PARTE BOARD OF TRADE [C. A. 369

4. —— *Proof of Debt—Loan to Trader—Interest varying with Profits—Subsequent Alteration of Terms—Bovill's Act* (28 & 29 *Vict. c.* 86), *ss.* 1, 5—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 2, 3.] By s. 5 of the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86; see now 53 & 54 Vict. c. 39, s. 3), where money is lent to a trader upon a contract in writing that the lender shall receive a rate of interest varying with the profits, the claim of such lender is, in the event of the bankruptcy of the borrower, postponed to that of the other creditors of the bankrupt; and it has been decided in *Ex parte Mills* (Law Rep. 8 Ch. 569), that an alteration of the terms of the original advance does not take the case out of the Act, unless the transaction amounts to a repayment of the advance and the making of a new loan.—On January 1, 1881, a sum of 20,000*l.* was advanced to a trader upon the terms of an agreement in writing, which provided (inter alia) that the borrower should pay to the lender interest on the 20,000*l.* at the fixed rate of 5 per cent. per annum, and also, by way of additional interest, such an amount as

BANKRUPTCY—*continued.*

might be equal to one-fourth of the net profits from time to time made by the borrower in his business. Towards the end of the year 1885 negotiations took place between the lender and the borrower as to an alteration of the terms of the agreement. The borrower offered to pay off the loan, and said that he would be able to do so, because a sum of nearly 20,000*l.* would be coming to him from an insurance company on December 31, 1885. The lender replied that he did not wish to have the loan repaid. Ultimately a new agreement in writing, dated January 25, 1886, was entered into, by which the lender agreed, as from January 1, 1886, "to continue his existing loan" to the borrower of 20,000*l.* upon the terms therein contained, and the borrower agreed, in consideration of the premises, to pay to the lender interest on the 20,000*l.* at the rate of 10 per cent. per annum.—In January, 1893, a receiving order was made against the borrower, and he was afterwards adjudged a bankrupt:—*Held*, that there had been nothing amounting to a repayment of the original loan, and a relending of the money upon new terms, and that consequently s. 5 of the Act applied, notwithstanding the alteration of the terms as regarded the payment of interest, and that the lender could not prove in the bankruptcy until after the other creditors had been paid in full. IN RE HILDESHEIM. EX PARTE THE TRUSTEE - - - - - C. A. 357

5. —— *Receiving Order—Rescission—Consent of Petitioning Creditor—Discretion of Court—Bankruptcy Rules*, 1890, *r.* 13.] When a receiving order has been made the Court will not, even though the proceedings under it have been stayed, rescind the order merely upon the consent of the petitioning creditor.—The Court has a discretion in the matter, and will not rescind the order without a full investigation of all the circumstances, including the conduct of the debtor.—*Ex parte Brigstocke* (4 Ch. D. 348) distinguished. IN RE FLATAU. EX PARTE OFFICIAL RECEIVER [C. A. 219

6. —— *Receiving Order—Sheriff—Execution—Interpleader—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 1—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 118, 119.] By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 1, "Where any goods of a debtor are taken in execution, and, before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."—*Held*, that under the sub-section, though interpleader proceedings are pending when notice of a receiving order is served on the sheriff, he is bound, on being so served, to deliver the goods or their proceeds to the official receiver, and is not entitled, as against the official receiver or the trustee in bankruptcy, to costs for any time for which he may remain in possession after he has been so served. IN RE HARRISON. EX PARTE THE SHERIFF OF ESSEX - - - - - 111

7. —— *Voluntary Settlement—Gift of Jewellery—Purchaser for Value and in Good Faith from Beneficiary—Notice—Bankruptcy Act*, 1883, *s.* 47.] Although s. 47 of the Bankruptcy Act, 1883, which avoids a voluntary settlement of property if the settlor becomes bankrupt within two years after the date of the settlement, contains no proviso for the protection of a purchaser in good faith and for valuable consideration, yet the title of such a purchaser from the beneficiary under the settlement, and without notice of the settlement, will be upheld against the trustee in bankruptcy of the settlor. IN RE VANSITTART. EX PARTE BROWN - - - - - 377

8. —— *Voluntary Settlement of Leaseholds—Mortgage by Donee under Settlement—Bankruptcy of Settlor—Bonâ fide Purchaser for Value—Notice—Bankruptcy Act*, 1883, *s.* 47.] The expression "void" in s. 47 of the Bankruptcy Act, 1883—which enacts that voluntary settlements of property shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy—must be construed as meaning "voidable" and not absolutely void, and a bonâ fide purchaser for value from the donee under such a voluntary settlement has a good title against the trustee in bankruptcy even if he purchased with notice that the donee claimed under a voluntary settlement. IN RE BRALL. EX PARTE NORTON 381

BASTARDY—Affiliation order—Notice of appeal—Service on solicitor of party—Duration of solicitor's authority - - 149
See JUSTICES. 2.

BEERHOUSE—Licence—Change of occupation—Application of new tenant - 530
See LICENSING ACTS. 3.

BILL OF EXCHANGE—*Validity—Bill made payable to "—— order"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 3, 5, 7, 55.] By the Bills of Exchange Act, 1882, s. 3: "A bill of exchange is an unconditional order in writing addressed by one person to another . . . . requiring the person to whom it is addressed to pay . . . . a sum certain in money to or to the order of a specified person, or to bearer," and "an instrument which does not comply with these conditions . . . . is not a bill of exchange." By s. 5: "A bill may be drawn payable to, or to the order of, the drawer." By s. 7: "Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty":—*Held*, that an instrument which was made payable to "—— order," the blank never having been filled in, must be construed as meaning that it was payable to "my order"—that is, to the order of the drawer, and that, having been indorsed by him, it was a valid bill of exchange. CHAMBERLAIN *v.* YOUNG - - C. A. 206

BILL OF SALE—*Registration—Omission to renew Registration—Rectification of Omission—Extension of Time—Bankruptcy—Official Receiver—Vested Right—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 14.] After the time had expired

BILL OF SALE—*continued.*
for renewing under s. 11 of the Bills of Sale Act, 1878, the registration of a bill of sale, and before any application had been made under s. 14 to rectify the omission, the grantor of the bill of sale was adjudicated a bankrupt, and his estate vested in his trustee in bankruptcy:—*Held*, affirming the judgment of the Queen's Bench Division, and following *Crew* v. *Cummings* (21 Q. B. D. 420), that the time for registration of the bill of sale could not be extended under s. 14, so as to defeat the vested rights of the trustee in bankruptcy.—*In re Dobbins' Settlement* (56 L. J. (Q. B.) 295) must be taken to be overruled by *Crew* v. *Cummings* (21 Q. B. D. 420). IN RE PARSONS. EX PARTE FURBER - - - C. A. 122

BUILDING ACTS—Erection of new buildings 44
See METROPOLIS.

BUILDING SOCIETY — *Winding-up — Outside Creditors of Society—Advanced Members—Obligation to repay Immediately the Future Instalments of Advance.*] The respondents were advanced members of a building society, registered and incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42). By the terms of the deed of mortgage, on the security of which the advance to the respondents was made, the sum advanced together with the interest thereon was to be repaid by instalments spread over a period of twenty-one years. By one of the rules of the society, borrowers were at liberty to redeem their mortgages on giving a certain notice, the amount of the redemption money payable in such case being the total amount of the future instalments of principal and interest less a certain discount on all moneys paid in advance of the due dates. Before the expiration of the twenty-one years, and while the mortgage remained unredeemed, the society was ordered to be wound up. At the date of the winding-up there were outside creditors of the society:—*Held*, that the respondents were liable to be placed on the list of contributories, and as such were compellable to pay immediately the future instalments of principal and interest provided by the mortgage deed, less the discount to which they would have been entitled upon a voluntary redemption under the society's rule in that behalf. LONDON PROVIDENT BUILDING SOCIETY *v.* MORGAN - - - 266

CANAL COMPANY—Metropolis—Buildings Acts—Erection of new buildings - 44
See METROPOLIS.

CASES—*Brigstocke, Ex parte* (4 Ch. D. 348) distinguished - - - - 219
See BANKRUPTCY. 5.

—— *Crew* v. *Cummings* (21 Q. B. D. 420) followed - - - - 122
See BILL OF SALE.

—— *Dobbins' Settlement, In re* (56 L. J. (Q. B.) 295) overruled - - - 122
See BILL OF SALE.

—— *Fishburn* v. *Hollingshead* ([1891] 2 Ch. 371) dissented from - - - 1
See COPYRIGHT.

CASES—*continued.*
—— *Kibble* v. *Gough* (38 L. T. (N.S.) 204) considered - - - - 65
See SALE OF GOODS.

—— *Laxon & Co., In re* ([1893] 1 Ch. 210) followed - - - - 386
See COMPANY.

—— *Morton* v. *Tibbett* (15 Q. B. 428) considered
See SALE OF GOODS. [65

—— *Moul* v. *Groenings* ([1891] 2 Q. B. 443) followed - - - - 1
See COPYRIGHT.

—— *Page* v. *Morgan* (15 Q. B. D. 228) considered
See SALE OF GOODS. [65

—— *Pickering Lythe East Highway Board* v. *Barry* (8 Q. B. D. 59) overruled - 333
See HIGHWAY.

CHARTERPARTY — Advance freight — Freight payable on signing bills of lading—Loss of cargo before bills of lading signed
See SHIP. 3. [518

—— Condition precedent—Warranty - 274
See SHIP.

—— Restraints of princes and rulers—Demurrage—Customary mode of loading - 323
See SHIP. 2.

CLUB—Licensing Acts—Proprietary club—Selling intoxicating liquors to members without a licence - - - 154
See LICENSING ACTS.

COMPANY — *Winding-up — Public Examination of Promoters—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Report of Official Receiver suggesting, but not expressly stating, Fraud in Promotion of the Company.*] An order for public examination under the Companies (Winding-up) Act, 1890, s. 8, sub-s. 3, may be made if the official receiver has made a further report under sub-s. 2 suggesting, though not stating expressly his opinion, that a fraud has been committed by some person in the promotion of the company.—*In re Laxon & Co.* ([1893] 1 Ch. 210) followed. IN RE THE BIRKDALE STEAM LAUNDRY AND CARPET BEATING COMPANY - - 386

COMPENSATION—Local government—Unwholesome meat—Refusal of justice to condemn—Costs incurred by owner of meat in resisting condemnation - 77
See LOCAL GOVERNMENT.

CONDITION PRECEDENT—Charterparty—Warranty - - - - - 274
See SHIP.

CONFESSION—Evidence of confession when admissible - - - - 12
See CRIMINAL LAW.

CONTEMPT—County court—Solicitor—Unqualified person—Power of county court judge to commit for contempt - - 195
See SOLICITOR.

COPYRIGHT — *International Copyright — Copyright Acts—International Copyright Acts*, 1844 *to* 1886—*English Copyright in Foreign Painting or Book—Right of Owner to sue for Infringement without Registration under Copyright Acts—The Berne Convention of Sept.* 5, 1887 — *Order in Council of Nov.* 28, 1887, *adopting the Berne Con-*

COPYRIGHT—*continued.*

vention—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 4—*Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 13—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 6.] *Held*, by Charles, J., that registration in accordance with s. 4 of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), is not necessary in order to entitle the owner of the English copyright in a foreign painting to sue for infringement.—Sect. 6 of the International Copyright Act, 1886 (49 & 50 Vict. c. 33), enacts that "where an Order in Council is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such Order comes into operation, shall be entitled to the same rights and remedies as if the said Acts, and this Act and the said Order, had applied to the said foreign country at the date of the said production; Provided that, where any person has before the date of the publication of an Order in Council lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."—Such an order in Council was made on November 28, 1887, and came into operation on December 6, 1887.—*Held*, by Charles, J., that the section applies to any literary or artistic work produced before December 6, 1887, the date at which the Order in Council of November 28, 1887, came into operation, whether produced before or after June 25, 1886, the date of the passing of the Act; and that the interest contemplated by the proviso is a direct subsisting pecuniary interest in the continuation of the production.—*Fishburn* v. *Hollingshead* ([1891] 2 Ch. 371) dissented from.—*Moul* v. *Groenings* ([1891] 2 Q. B. 443) followed. HANFSTAENGL ART PUBLISHING COMPANY *v.* HOLLOWAY - - - 1

2. —— *Dramatic—Infringement—Author—Original Play—Sole Liberty of Representation—3 & 4 Wm. 4, c. 15, s. 1.*] By 3 & 4 Wm. 4, c. 15, s. 1, the author, or his assignee, of any play, composed and not printed or published by the author thereof or his assignee, shall have as his own property the sole liberty of representing such play at any place of dramatic entertainment whatsoever in any part of the United Kingdom, and shall be deemed and taken to be the proprietor thereof.—In an action for the infringement of the plaintiffs' sole liberty of representing a play of which they were the joint authors, it was proved that the plaintiffs commenced to write the play in the autumn of 1889, and, having finished it in March, 1892, it was publicly performed at a theatre on June 30, 1892; that the defendants wrote a play in many respects similar to the plaintiffs' play, and that the defendants' play was written and completely finished between the end of 1889 and the early part of 1890, and was publicly performed at a theatre on July 4, 1892. The defendants' play was, as between the parties to the action, in every respect an original play, and in no way copied from or suggested by the plaintiffs, and there was no direct evidence that both plays came from a common source:—*Held*, that, assuming the two plays to be substantially alike either wholly or in material parts, the plaintiffs were not entitled to maintain their action, because the defendants, having written and finished their play before the plaintiffs had written and finished theirs, were entitled to the sole liberty of representation thereof under 3 & 4 Wm. 4, c. 15, s. 1, and, their right having vested, there was nothing in any subsequent legislation to deprive them of it. REICHARDT *v.* SAPTE 308

COSTS—Justices—Dismissal of information—Order against complainant for costs—Enforcement by committal - 146
See JUSTICES.

—— Parliament—Election—Charges of returning officer - - - - 121
See PARLIAMENT. 2.

—— Solicitor—Bill of costs—Taxation—Series of bills treated as one—Payment by giving negotiable security - - 286
See SOLICITOR. 3.

—— Unwholesome meat—Refusal of justices to condemn—Costs incurred by owner of meat in resisting condemnation - 77
See LOCAL GOVERNMENT.

COSTS, SECURITY FOR - - - 193
See PRACTICE. 7.

COUNTY COUNCIL—Poor-rate—Valuation list—Appeal - - - - 476
See POOR-RATE. 3.

—— Statute local or personal—Power to amend
See LOCAL GOVERNMENT. 4. [454

COUNTY COURT—Remitted action—Change of parties—Death of one of several defendants—Application to compel plaintiff to proceed - - - - 260
See PRACTICE. 3.

—— Solicitor—Unqualified person—Power of county court judge to commit for contempt - - - - 195
See SOLICITOR.

COVENANT—Lease—Breach of covenant to deliver up premises in repair—Measure of damages - - - 164
See LANDLORD AND TENANT. 3.

—— Lease—Covenant by lessee to pay charge imposed on lessor in respect of premises—Order of sanitary authority on lessor to abate nuisance - - - 53
See LANDLORD AND TENANT. 2.

—— Lease—Covenant to "repair, uphold, and maintain" demised premises—Inherent defect in premises - - - 212
See LANDLORD AND TENANT. 5.

CRIMINAL LAW—*Evidence—Confession—Evidence of Confession, when admissible.*] In order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such confession was free and voluntary, that is, was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed.—The prisoner was tried for embezzling the money of a company. It was proved at the trial

CRIMINAL LAW—*continued.*
that, on being taxed with the crime by the chairman of the company, he said, "Yes, I took the money," and afterwards made out a list of the sums which he had embezzled, and with the assistance of his brother paid to the company a part of such sums. The chairman stated that at the time of the confession no threat was used and no promise made as regards the prosecution of the prisoner, but admitted that, before receiving it, he had said to the prisoner's brother, "It will be the right thing for your brother to make a statement," and the Court drew the inference that the prisoner, when he made the confession, knew that the chairman had spoken these words to his brother:—*Held*, that the confession of the prisoner had not been satisfactorily proved to have been free and voluntary, and that therefore evidence of the confession ought not to have been received. THE QUEEN *v.* THOMPSON C. C. R. 12

2. —— *Cruelty to Animals*—"*Domestic Animals*"—*Wild Rabbits confined and coursed in Enclosure*—12 & 13 *Vict. c.* 92, *ss.* 2, 29—17 & 18 *Vict. c.* 60, *s.* 3.] The respondents coursed with dogs, in an enclosed field, wild rabbits, which had been caught in nets five or six days previously, and since kept in confinement and fed, and cruelly tortured them.—On a case stated on an information for cruelly torturing the rabbits:—*Held*, that the rabbits were not "domestic animals," and therefore the respondents could not be convicted. APLIN *v.* PORRITT - 57

—— Malicious prosecution—Criminal proceeding—Proceeding against passenger for refusing to pay fare - - 304
See MALICIOUS PROSECUTION.

CRUELTY TO ANIMALS—Domestic animals—Wild rabbits confined and coursed in enclosure - - - - 57
See CRIMINAL LAW. 2.

DAMAGES, MEASURE OF—Breach of covenant to deliver up premises in repair - 164
See LANDLORD AND TENANT. 3.

DEED OF ARRANGEMENT—Accounts of trustee—Board of Trade—Retrospective effect of statute - - - - 369
See BANKRUPTCY. 3.

DEMURRAGE—Restraints of princes and rulers—Customary mode of loading - 323
See SHIP. 2.

DETENTION—Goods under 15*l.* value—Metropolitan magistrate—Estoppel - 172
See ESTOPPEL.

DISCOVERY—Affidavit of documents—Sufficiency of affidavit—Privilege from production
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—— Photographs of documents - - 191
See PRACTICE. 5.

DISTRESS—Rent payable in advance if required—Requirement during currency of quarter—Reasonable notice - - 49
See LANDLORD AND TENANT.

—— Want of title in lessor—Estoppel—Right to distrain goods of third party - 168
See LANDLORD AND TENANT. 4.

DRAMA—Copyright in - - - 308
See COPYRIGHT. 2.

ELECTION — Parliament — Costs — Charges of returning officer - - - 121
See PARLIAMENT. 2.

ESTOPPEL—*Metropolitan Magistrate—Detention of Goods under* 15*l. value within Metropolitan Police District—Order of Magistrate for Delivery up of Goods—Action for Special Damage arising out of same Detention—Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 40.] A person who obtains an order from a police magistrate under s. 40 of the Metropolitan Police Act, 1839, for the delivery up of goods improperly detained, is not thereby precluded from subsequently bringing an action for special damage arising out of the same detention. MIDLAND RAILWAY COMPANY *v.* MARTIN & Co. - - - 172

—— Landlord and tenant—Right to distrain goods of third party - - 168
See LANDLORD AND TENANT. 4.

—— Principal and agent—Set-off against principal of debt due from agent - 350
See PRINCIPAL AND AGENT.

EVIDENCE—Act of bankruptcy—Bankruptcy petition—Notice of suspension of payment of debts—Notice "without prejudice" - - - - 116
See BANKRUPTCY.

—— Confession—Evidence of confession, when admissible - - - - 12
See CRIMINAL LAW.

EXECUTION—Judgment against firm—Infant partner - - - - 534
See PRACTICE.

FACTOR—Sale of goods—Furniture—Hire and purchase agreement - - 318
See SALE OF GOODS. 2.

FRAUDS, STATUTE OF—Sale of goods—Memorandum in writing—Severed documents—Acceptance - - - 65
See SALE OF GOODS.

FRIENDLY SOCIETY — *Industrial Assurance Company — Offences — Assurance on Life — Payments on Death of Children under Ten — Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *s.* 2—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *ss.* 4, 28—*Definitions—Construction.*] Sect. 28 of the Friendly Societies Act, 1875, sub-s. 2, provides that no society shall pay any sum on the death of a child under ten except to the child's parent, or to the parents' personal representative, and upon the production, by such parent or personal representative, of a certificate of death issued by the registrar of deaths. By sub-s. 7 the word "society" in s. 28 "shall include all industrial assurance companies assuring the payment of money on the death" of children under ten. By s. 4, if not inconsistent with the context, the term "industrial assurance company" means "any company as defined by the Life Assurance Companies Act, 1870, which grants assurances on any one life for a less sum than 20*l.*, and which receives premiums or contributions, by means of collectors, at less periodical

FRIENDLY SOCIETY—*continued.*

intervals than two months." By s. 2 of the Life Assurance Companies Act, 1870, "the term 'company' means any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life, or who grant annuities upon human life, within the United Kingdom."—The appellants were a society registered as a company under the Companies Acts, but not registered under the Friendly Societies Acts. Under the memorandum and articles of association members who paid subscriptions fortnightly to the collectors of the society were entitled to receive certain sick pay and sums for funeral expenses incurred on the death of their children, and a subscription card was issued to each member on which the collectors entered the contributions received from time to time. The appellants, having paid 5*l.* to a member on the death of her child under ten without the production by her of a certificate of death issued by the registrar of deaths, were summarily convicted of an offence against s. 28 of the Friendly Societies Act, 1875:—*Held*, that the appellants were not within the definition of "company" in s. 2 of the Life Assurance Companies Act, 1870, as being persons "who issue or are liable under policies of assurance upon human life," but that those words should be rejected as inconsistent with the context, and therefore that the appellants were a society within s. 28, sub-s. 2, of the Friendly Societies Act, 1875, and rightly convicted. NEWBOLD FRIENDLY SOCIETY *v.* BARLOW - - - - - - 128

GASWORKS—Poor-rate—Right to use of mains for supply of gas - - - 468
See POOR-RATE. 2.

HABEAS CORPUS—Infant, custody of—Parent and child—Guardianship, right of parent to—Absence of misconduct by parent
See INFANT, CUSTODY OF. [232

HIGHWAY—*Repair—Excessive User of Road—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—"*Extraordinary Traffic.*"] Sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, gives power to a road authority, where extraordinary expenses have been incurred by such authority in repairing a highway "by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon," to recover the amount of those expenses from the person by whose order the weight or traffic has been conducted:—*Held*, that the expression "extraordinary traffic" in s. 23, as distinct from "excessive weight," includes all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair. "Extraordinary traffic" is a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and thereby to cause damage and expense beyond what is common.—The mere user of the road, however, by one person more than others does not constitute "extraordinary traffic," even though it be his own user which has produced the damage to the road; the traffic must be extraordinary as regards the ordinary user of the road by all who use it, and not merely large as regards the traffic put on it by other persons.—*Pickering Lythe East Highway Board* v. *Barry* (8 Q. B. D. 59) overruled. HILL *v.* THOMAS - - C. A. 333

2. —— *Rate—Publication—Highway Parish having no Church—Notice affixed in Conspicuous Place*—17 *Geo.* 2, *c.* 3, *s.* 1—5 & 6 *Wm.* 4, *c.* 50, *s.* 27—7 *Wm.* 4 *and* 1 *Vict. c.* 45, *s.* 2—45 & 46 *Vict. c.* 20, *s.* 4.] A highway rate made for a "parish" within the meaning of the Highway Act, 1835, but not being a poor-law or ecclesiastical parish, and having no church, is duly published if notice thereof is affixed in some public and conspicuous place or situation in such highway parish. THE QUEEN *v.* WOLFERSTAN - 451

—— Pasturage—Prescription—Claim of inhabitants of parish to land—Presumption of grant to trustees - - - 19
See INCLOSURE.

HUSBAND AND WIFE — Protection order — Judgment against married woman — Equitable execution - - 85
See PRACTICE. 12.

INCOME TAX—Profits earned abroad and remitted to England - - 499
See REVENUE.

INCLOSURE—*Highway — Pasturage — Prescription—User — Presumption of Lawful Origin — Claim of Inhabitants of Parish to Land—Presumption of Grant to Trustees—Presumption of Enrolment—Presumption of Grant for purpose not requiring Enrolment — Charitable Uses Act* (9 *Geo.* 2, *c.* 36)—*Vesting of Property of Parish in Churchwardens and Overseers*—59 *Geo.* 3, *c.* 12, *s.* 17—*Statute of Limitations.*] By an award made under an Inclosure Act passed in the year 1774 certain lands were allotted and certain roads set out as public highways. From a short time after the passing of the Act the pasturage of one of the roads set out was let annually by the inhabitants of the parish in vestry assembled. The money received from the tenants was devoted to different parochial purposes, and there had been no interference or claim by the lords of the manor until the present action, in which the plaintiff, as lord of the manor, claimed damages from the defendant, who was tenant to the vestry, for trespass in pasturing his sheep in the road. There was no evidence in whom the soil of the road was vested before the passing of the Inclosure Act. No grant of the road was produced, and there was no evidence of the enrolment of any such grant:—*Held* (affirming the judgment of Charles, J.), that a lawful origin must be presumed from the long usage, and that the presumption was that the road was vested in some person or persons as trustees for the parishioners:—*Held*, further, that a presumption

INCLOSURE—*continued.*
might be made either that the grant of the road had been enrolled, or that the grant had been made for some purpose which had since been lost sight of, but which did not require that the deed should be enrolled:—*Held*, further, that the churchwardens and overseers, as trustees under 59 Geo. 3, c. 12, s. 17, of lands belonging to the parish, had gained a title to the road under the Statute of Limitations, subject to the public right of way. HAIGH *v.* WEST - - C. A. 19

INFANT—Partner—Judgment against firm 534
See PRACTICE.

INFANT, CUSTODY OF—*Parent and Child—Guardianship, Right of Parent to—Absence of Misconduct by Parent—Interference with Parental Right, Grounds for—Habeas Corpus, Jurisdiction of Court upon—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 25, *sub-s.* 10.] On an application by habeas corpus, by the mother, who was the legal guardian, of a female infant, aged about fifteen, for the custody of such infant:—*Held*, affirming the judgment of the Queen's Bench Division, that, having by virtue of the Judicature Act, 1873, on such an application the Chancery jurisdiction with regard to the custody of infants, the Court, although the mother had not been guilty of any misconduct to disentitle her to the custody of the child, would, if satisfied that it was essential for the welfare of the child, refuse to give the mother such custody.—Grounds upon which a parent's rights may be interfered with considered. THE QUEEN *v.* GYNGALL C. A. 232

INFORMATION — Dismissal — Order against complainant for costs—Enforcement by committal - - - - - 146
See JUSTICES.

INTEREST—Disqualification — Justices — Poor-rate - - - - - - 347
See JUSTICES. 3.

INTERPLEADER—Money in hands of sheriff —Money to abide order of Court—Right of sheriff to retain money till order 329
See SHERIFF.

JURY—Right to trial by jury - - 406
See PRACTICE. 9.

JUSTICES—*Practice—Dismissal of Information—Order against Complainant for Costs—Enforcement by Committal—Summary Jurisdiction Acts*, 1848 *and* 1879 (11 & 12 *Vict. c.* 43, *s.* 22; 42 & 43 *Vict. c.* 49, *ss.* 35, 47).] Where an information is dismissed by justices, and an order for costs is made against the complainant, if no sufficient distress is found, and it is proved that the complainant has, or has had since the date of the order, means to pay, such order may be enforced by committal. THE QUEEN *v.* LORD MAYOR OF LONDON. EX PARTE BOALER - - 146

2. —— *Quarter Sessions—Appeal, Notice of—Service on Solicitor of Party—Duration of Solicitor's Authority—Affiliation Order—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 2.] Notice of appeal against an affiliation order was served upon the solicitor who had appeared for the mother on the hearing of the application for the order at petty sessions, and such service was accepted by him on her behalf:—*Held*, that, his retainer as solicitor having come to an end upon the making of the order, he had no authority to accept service of the notice of appeal, and there was no valid service of such notice. THE QUEEN *v.* JUSTICES OF OXFORDSHIRE - - - C. A. 149

3. —— *Jurisdiction—Disqualification by Interest — Appeals against Poor-rates — Special Sessions*—16 *Geo.* 2, *c.* 18, *ss.* 1, 3—27 & 28 *Vict. c.* 39, *s.* 6.] By 16 Geo. 2, c. 18, s. 1, justices of the peace for any county, riding, city, borough, &c., may do any act appertaining to their office concerning parochial taxes, levies, or rates, notwithstanding that they are themselves rated to or chargeable with the taxes, levies, or rates within any parish, township, or place affected by such act. By s. 3, nothing contained in the Act shall authorize any justice for any county or riding at large to act in the determination of any appeal to quarter sessions from any order, matter, or, thing relating to any parish, township, or place where such justice is charged, taxed, or chargeable as aforesaid. By s. 6 of 27 & 28 Vict. c. 39, no justice of the peace shall be disqualified for acting in the determination of any appeal against a poor-rate at any quarter or special sessions by reason of his being rated, or being liable to be rated, in some other parish in the union than that for which the rate appealed against is made:—*Held*, that s. 1 of 16 Geo. 2, c. 18, gave the justices of a corporate city, sitting at special sessions, jurisdiction to hear an appeal against a poor-rate, notwithstanding they were rated to the relief of the poor in the parish for which the rate appealed against was made, and that s. 6 of 27 & 28 Vict. c. 39, did not impliedly take away that jurisdiction. THE QUEEN *v.* BOLINGBROKE [347

LANDLORD AND TENANT—*Distress—Rent payable in Advance if Required—Requirement during Currency of Quarter—Reasonable Notice.*] The defendants let a house to a tenant upon a yearly tenancy under an agreement whereby the rent was reserved "payable quarterly on the usual quarter days, and always if required in advance." The tenant granted a bill of sale of his goods in the house to the plaintiffs, who, upon default in payment of the amount secured by the bill of sale, took possession of the goods and fixed a day for their sale. On the morning of the sale, which occurred in the middle of a quarter, the defendants demanded of the tenant, under threat of immediate distress, the rent for the current quarter in advance. The plaintiffs, to prevent the sale from being interrupted, paid the rent under protest, and then brought an action to recover it back:—*Held*, that under the above agreement the defendants were entitled to demand the quarter's rent in advance at any time during the currency of the quarter, that in the event of non-payment upon such demand they would under the circumstances of the case have been entitled to distrain immediately, and that consequently the money

LANDLORD AND TENANT—*continued.*

paid by the plaintiffs could not be recovered back. LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - 49

2. —— *Lease—Covenant by Lessee to pay Charge imposed on Lessor in respect of Premises—Order by Sanitary Authority on Lessor to abate Nuisance—Expenses incurred in complying with Order—Liability of Lessee—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76).] A lessee covenanted to pay, bear, and discharge all land-tax, sewers rate, main drainage rate, and all other rates, taxes, assessment charges, or impositions whatsoever, parliamentary, parochial, or otherwise, taxed, charged, assessed, or imposed upon the demised premises, or on the lessor for or in respect of the premises. The lessee also covenanted to repair. The lessee failed to repair, in consequence of which a drain on the premises got out of order, and caused a nuisance. The sanitary authority made an order on the lessor, under the Public Health (London) Act, 1891, directing him to repair the drain. The lessor incurred expenses in complying with this order, and sued the lessee to recover the amount:—*Held*, that the expenses so incurred were a charge imposed on the lessor in respect of the premises, and the plaintiff was entitled to recover. SMITH *v.* ROBINSON - - - - - - 53

3. —— *Lease—Breach of Covenant to deliver up Premises in Repair—Measure of Damages.*] A lessor brought an action against the lessee during the currency of the lease to recover damages for breaches of covenant to keep the premises in repair; the lessee paid a sum into Court, which was accepted by the lessor in satisfaction, and the action was discontinued. No repairs were done to the premises before the determination of the lease, after which date the lessor brought a fresh action against the lessee to recover damages for breaches of the covenants to keep in repair and deliver up in repair; the particulars in the action included the items of non-repair in respect of which the claim had been made in the first action, and also additional items arising since the date of that action. The official referee assessed the damages by determining the sum required at the end of the lease to put the premises into repair, and deducting therefrom the amount paid into Court and accepted by the plaintiff in the first action, together with a sum for depreciation:—*Held*, that the money paid into Court in the first action must be taken to have been paid in and accepted as damages for the injury to the reversion, and not as being the sum then required to put the premises into repair, and that the damages in the second action had therefore been assessed upon the right principle. HENDERSON *v.* THORN - - - - 164

4. —— *Distress—Want of Title in Lessor—Estoppel—Right to distrain Goods of Third Party.*] Although a tenant who has been let into possession of land by a lessor is estopped from disputing his lessor's title, third persons, not claiming possession of the land under the tenant, are not so estopped. A person, therefore, who lets premises to which he has no title to a tenant, cannot distrain for arrears of rent due from the tenant the goods of a third person which happen to have been brought on to the premises by the tenant's licence. TADMAN *v.* HENMAN - - - 168

5. —— *Covenant by Lessee to "repair, uphold, and maintain" Demised Premises—Inherent Defect in Premises.*] The plaintiffs granted to the defendants a lease of a house in Lambeth, containing a covenant by the lessees that they would "when and where and as often as occasion shall require, well, sufficiently, and substantially, repair, uphold, sustain, maintain, amend and keep" the demised premises, and the same "so well and substantially repaired, upheld, sustained, maintained, amended and kept," at the end of the term yield up to the lessors. Before the end of the term one of the walls of the house was bulging out, and after the end of the term the house was condemned by the district surveyor as a dangerous structure and was pulled down. The plaintiffs sought to recover from the defendants the cost of rebuilding the house. The evidence shewed that the foundation of the house was a timber platform, which rested on a boggy or muddy soil. The bulging of the wall was caused by the rotting of the timber. The house was at least 100 years old, and possibly much older. The solid gravel was seventeen feet below the surface of the mud. There was evidence that the wall might have been repaired during the term by means of underpinning:—*Held*, that the defect having been caused by the natural operation of time and the elements upon a house the original construction of which was faulty, the defendants were not under their covenant liable to make it good. LISTER *v.* LANE & NESHAM - - C. A. 212

—— Building let in flats—Staircase out of repair—Landlord, liability of, to persons other than tenants - - - 177
See NEGLIGENCE.

—— Forfeiture—Application for relief under Conveyancing Acts - - 254
See PRACTICE. 4.

LIBEL—Particulars—Practice - - 183
See PRACTICE. 10.

LICENSING ACTS—*Proprietary Club—Selling intoxicating Liquors to Members without a Licence—6 Geo.* 4, *c.* 81, *s.* 26; 4 & 5 *Wm.* 4, *c.* 85, *s.* 17; 23 & 24 *Vict. c.* 27, *s.* 19; 35 & 36 *Vict. c.* 94, *s.* 3.] The respondents, a registered company, were the proprietors of a club. The appellant applied to become a member of the club, and, having paid a subscription, was elected an honorary member pending inquiries, and was then supplied with beer, wine, and spirits, for which he paid. The respondents did not hold any licence for the sale of intoxicating liquors:—*Held*, that the respondents might be convicted for selling beer, wine, and spirits without a licence. BOWYER *v.* PERCY SUPPER CLUB - - - - - 154

2. —— *Beerhouse—Application for Certificate of Justices—Notice—Time, Computation of—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 7 *—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 40, 43, 50.] By s. 7 of the Wine and Beerhouse Act, 1869, "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give

LICENSING ACTS—*continued.*
notice in writing of his intention to one of the overseers of the parish, &c.":—*Held*, that the twenty-one days are to be computed, not from the first day of the general annual licensing meeting at which the application is made, but from the day upon which the application is actually heard. THE QUEEN *v.* POWNALL - - 158

3. —— *Licence—Change of Occupation—Removal of Licence-holder—Application by New Tenant—Notice of Application—Transfer*—9 *Geo.* 4, *c.* 61, *ss.* 4, 14—35 & 36 *Vict. c.* 94, *s.* 40, *sub-sect.* 2; *s.* 74.] Sect. 40, sub-s. 2, of the Licensing Act, 1872, which requires fourteen days' notice of an application for a transfer of a licence to be given by the person intending to apply for the transfer, does not apply to an application, under s. 14 of the Licensing Act, 1828, by a new tenant or occupier of a licensed house for a licence where the licence-holder has removed from or yielded up possession of the house during the currency of the licence. THE QUEEN *v.* HUGHES - - - - - - 530

LIMITATIONS, STATUTE OF—*Trust, Breach of—Trustee, whether express or constructive—Solicitor to Trust, Receipt of Trust Fund by—Failure to Account.*] A trust fund was held by trustees under a will in trust for two persons in equal shares for their respective lives and, after the death of each, in trust as to his share for his children. The fund was entrusted by the trustees to a solicitor employed by them as solicitor to the trust, and was by him invested, together with other moneys belonging to different trusts, on an equitable mortgage by deposit of title deeds, in his own name. The mortgage being paid off in January, 1879, the solicitor received the money so invested from the mortgagor, and distributed one moiety of it, the tenant for life having died, among his children, who by his death had become absolutely entitled to the same. He did not account for the other moiety to the trustees, but retained the same in his own hands.—On February 21, 1891, an action was brought by the surviving trustee under the will against the personal representative of the solicitor, who had died in November, 1879, claiming an account of the money so retained by him:—*Held*, that he must be considered as having been in the position of an express trustee of such money, and therefore the lapse of time did not act as a bar to the action: by Lord Esher, M.R., and Bowen, L.J., because he received the money in a fiduciary relation and as trustee for his clients, the trustees; by Kay, L.J., because he, though a stranger to the trust, had assumed to act and had acted as a trustee, and had received the trust money under a breach of trust in which he concurred. SOAR *v.* ASHWELL - - C. A. 390

—— Claim of inhabitants to land—Presumption of grant to trustees - - - 19
See INCLOSURE.

LOCAL GOVERNMENT—*Offences—Unwholesome Meat—Refusal of Justice to Condemn—Costs incurred by Owner of Meat in resisting Condemnation—"Full Compensation"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.] Although the owner of the meat which has been seized by an inspector and brought before a justice for condemnation under ss. 116 and 117 of the Public Health Act, 1875, is not entitled as of right to attend and give evidence in defence of the meat, the justice may, if he thinks fit, hear evidence tendered by such owner in that behalf, and if, after so doing, the justice should refuse to condemn the meat, the full compensation which the owner may be awarded under s. 308 will include the costs which he has reasonably incurred in resisting the condemnation of the meat. Judgment of the Queen's Bench Division affirmed. IN RE BATER AND MAYOR, &C., OF BIRKENHEAD [C. A. 77

2. —— *Rates—Lighting Rate—Application for Distress Warrant—What Proof Necessary—Lighting and Watching Act*, 1833 (3 & 4 *Wm.* 4, *c.* 90), *ss.* 5–15.] Upon the hearing of a summons for non-payment of a rate made under the Lighting and Watching Act, 1833, it is not necessary for the overseers to prove that the formalities prescribed by that Act for its due adoption by the parish have been complied with. THE QUEEN *b.* REYNOLDS - - - 75

3. —— *Sewer—Sewer constructed by Landowner—Vesting in Local Sanitary Authority—Sewer constructed for Profit of Landowner—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 3.] By s. 13 of the Public Health Act, 1875, "all existing and future sewers within the district of a local authority . . . . except (1.) sewers made by any person for his own profit, or by any company for the profit of the shareholders . . . . shall vest in and be under the control of such local authority":—*Held*, that a sewer made by a landowner for the sole purpose of draining houses erected by him on his own land is not made by him "for his own profit" within the meaning of the above exception, and that, consequently, such a sewer vests in the local authority. FERRAND *v.* HALLAS LAND AND BUILDING COMPANY - - - - - C. A. 135

4. —— *Alteration of Parish by County Council—Transfer of part of a Parish to another Parish—Power to amend Local and Personal Acts—Act partly Public and General and partly Local and personal—Amendment of Local and Personal part of Act—Prohibition—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 57, *sub-ss.* 1, 6; *s.* 59, *sub-s.* 6.] Under 9 Anne, c. 22, and 10 Anne, c. 11, land in the parish of St. Pancras, London, was purchased as a burial-ground for the parish of St. George, Bloomsbury, and, on consecration, became part of the latter parish. By an Order in Council burials were discontinued in the burial-ground, and the parish of St. Pancras subsequently applied to the London County Council, under the Local Government Act, 1888, s. 57, for an order transferring the burial-ground from the parish of St. George, Bloomsbury, to the parish of St. Pancras, and the council gave notice of their intention to hold an inquiry under the Act. On an application for a prohibition to the council:—*Held* (affirming the judgment of the Divisional Court), that the power of the county council to amend, by scheme or order, any local or personal Act extends to the amendment of any portion of an Act, whether public and general or local and

LOCAL GOVERNMENT—*continued.*

personal, provided the portion amended is of a local and personal nature; that the clauses of the statutes of Anne which related to the burial-ground were of a local and personal nature; and that, consequently, the county council had authority to entertain the proposal and make an order.—*Quære*, whether prohibition would lie in such a case. THE QUEEN *v.* LONDON COUNTY COUNCIL - - - - - C. A. 454

MALICIOUS PROSECUTION—*Criminal Proceeding—Tramway Company—Proceedings against Passenger for refusing to pay Fare—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 51, 52, 56.] By s. 51 of the Tramways Act, 1870, any person travelling in any carriage on any tramway, who avoids or attempts to avoid payment of his fare, or any person who, having paid his fare for a certain distance, knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, shall for such offence be liable to a penalty not exceeding 40*s.*; and by s. 56, all tolls, penalties, and charges under this Act may be recovered and enforced under 11 & 12 Vict. c. 43, and any Act amending the same:—*Held*, that proceedings taken under s. 51 were proceedings in respect of a criminal offence, so that an action for malicious prosecution would lie against the persons taking them. RAYSON *v.* SOUTH LONDON TRAMWAYS COMPANY - C. A. 304

MARRIED WOMAN — Bankruptcy notice — Married woman trading separately 113
See BANKRUPTCY. 2.

—— Protection order—Judgment against married woman—Equitable execution - 85
See PRACTICE. 12.

METROPOLIS — *Buildings Acts — Erection of New Buildings—Notice—Exemption—Canal Company—Buildings "used for the purposes of" a Canal—Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 6, 38.] By the Metropolitan Building Act, 1855, s. 38, two days before any building is commenced, a notice in writing containing specified particulars must be given by the builder to the district surveyor appointed under the Act: and s. 6 exempts from the operation of this part of the Act any building belonging to a canal company, "and used for the purposes of" the canal under the provisions of any Act of Parliament.—A canal company under their statutory powers put up a building upon one of their wharves, the wharf and the building being let by the company to an institution for distributing firewood. The building was used by the tenants as a place in which to chop up firewood. The company were not a carrying company, but took tolls for the passage of barges along their canal, and it was agreed between themselves and their tenants that all the wood required by the latter should be brought to the wharf and building in their barges along the company's canal:—*Held*, that the building was not "used for the purposes of the canal" within the meaning of s. 6 of the Metropolitan Building Act, 1855, and therefore that the notice required by s. 38 ought to have been given. COOLE *v.* LOVEGROVE - - 44

METROPOLIS—*continued.*

2. —— *Hanging out Articles in front of House—Michael Angelo Taylor's Act* (57 *Geo.* 3, *c. xxix.*), *s.* 65—*Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 119.] Sect. 65 of 57 Geo. 3, c. xxix. (inter alia), empowers vestries in the metropolis to take summary proceedings against persons hanging out or exposing anything whatsoever from any house over any part of the pavement, or over any area, and refusing to remove such thing when required to do so. By s. 119 of the Metropolis Management Act, 1855, if any projection or obstruction placed against or in front of any house "shall be an annoyance in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street," the vestry have power to compel its removal:—*Held*, that s. 119 of the Metropolis Management Act, 1855, was not inconsistent with, and therefore did not impliedly repeal, the provisions of s. 65 of 57 Geo. 3, c. xxix., relating to the particular offence created by that section. WYATT *v.* GEMS [225

3. —— *Management Acts—Height of Buildings—House at Corner of two Streets—Building erected on the side of a new Street—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 85.] By s. 85 of the Metropolis Management Amendment Act, 1862, no building except a church or chapel is to be erected on the side of a new street of a less width than fifty feet, which exceeds in height the distance from the external wall or front of such building to the opposite side of the street, without the consent in writing of the Metropolitan Board of Works (now the London County Council).—The respondents' house was built at the corner of an old street and of a new street less than fifty feet wide; the front of the building and the main entrance were in the old street. The house was, without the written consent of the London County Council, built to a height greater than the width of the new street:—*Held*, that, although its main frontage was in the old street, the house was nevertheless "erected on the side of a new street" within the meaning of s. 85, and that an offence had therefore been committed by the respondents against that section. LONDON COUNTY COUNCIL *v.* LAWRANCE & SONS - - - - 228

—— Poor-rate—Valuation list—Time for appealing - - - - - 476
See POOR-RATE. 3.

NEGLIGENCE—*Dangerous Premises—Building let in Flats—Staircase out of Repair—Landlord, Liability of, to Persons other than Tenants—Implied undertaking to Repair Staircase.*] The defendant was the owner of a building in the City, the different floors of which were let by him separately as chambers or offices, the staircase, by which access to them was obtained, remaining in the possession and control of the defendant. The plaintiff, who had in the course of business called on the tenants of one of the floors, fell, while coming down the staircase, through the worn and defective condition of one of the stairs, and sustained personal injuries. The plaintiff having

NEGLIGENCE—*continued.*
sued the defendant in respect of such injuries:—*Held*, that there was by necessary implication an agreement by the defendant with his tenants to keep the staircase in repair, and, inasmuch as the defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition, and the action was therefore maintainable. MILLER *v.* HANCOCK - - - **C. A. 177**

PAINTING—Copyright - - - **1**
See COPYRIGHT.

PARISH—Alteration of—County council—Local or personal Act—Power to amend **454**
See LOCAL GOVERNMENT. 4.

—— Claim of inhabitants of parish to land—Presumption of grant to trustees - **19**
See INCLOSURE.

PARLIAMENT — *Election — Practice — Election Petition—Appeal on Interlocutory Matter—Decision of High Court on Question of Law—Amendment of Petition—Leave of High Court—Judge not on Rota for Trial of Election Petitions—Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 40, 56—*Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 14.] By s. 14 of the Judicature Act, 1881, "the jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under . . . the Parliamentary Elections Act, 1868 . . . or any Act amending the same, shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."—An order for the amendment of an election petition made under s. 40 of the Corrupt and Illegal Practices Prevention Act, 1883, by a judge sitting at chambers, who was not on the rota for the trial of election petitions, having been rescinded by the High Court on the ground that he had no jurisdiction to make such order:—*Held*, that the question so decided was one of law within the meaning of s. 14 of the Judicature Act, 1881, and consequently that no appeal lay to the Court of Appeal without leave. SHAW *v.* RECKITT - - - - **C. A. 59**

2. —— *Election—Costs—Charges of Returning Officer — Parliamentary Elections (Returning Officers) Act*, 1875 (38 & 39 *Vict. c.* 84), *s.* 3, *sub-s.* 6, *s.* 4.] It is the duty of a returning officer, whose account has been taxed under s. 4 of the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), to return to each candidate, out of his deposit, a proportionate amount of any part of the account which has been disallowed, whether such candidate has or has not been a party to the taxation. MARTIN *v.* TOMKINSON **121**

PARTICULARS—Libel—Practice - - **183**
See PRACTICE. 10.

PARTIES—Change of parties—Death of one of several defendants—Action remitted to county court—Application to compel plaintiff to proceed—Jurisdiction **260**
See PRACTICE. 3.

PARTIES—*continued.*
—— Plaintiffs, joinder of—Joinder of causes of action - - - - **412**
See PRACTICE. 13.

PARTNERSHIP—Action against firm — Judgment against firm—Infant partner **534**
See PRACTICE.

—— Loan to trader—Interest varying with profits—Subsequent alteration of terms **357**
See BANKRUPTCY. 4.

PICTURE—Copyright - - - - **1**
See COPYRIGHT.

POOR LAW—*Derivative Settlement—Child under Sixteen — Second Marriage of Mother — Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] Under the 35th section of the Divided Parishes Act, 1876, as interpreted by the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (14 App. Cas. 465), the children under sixteen years of age of a first marriage do not follow the settlement derived by their mother from a second husband. GUARDIANS OF LLANELLY UNION *v.* GUARDIANS OF NEATH UNION - **38**

POOR-RATE — *Tenant for Term not exceeding Three Months—Rate made for period of a Year—Claim to pay by Instalments—Demand, Sufficiency of—Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 2.] By the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), an Act for amending the law with respect to the rating of occupiers for short terms, s. 2, "No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of a year":—*Held*, that where any such occupier after having been served with a demand in writing for the full amount of a rate claims to pay under the section such rate by instalments, a distress warrant may be issued for non-payment of any such instalment upon proof that it was orally demanded by the overseers. OVERSEERS OF WALTON-ON-THE-HILL *v.* JONES **175**

2. —— *Occupation — Exclusive Use — Gas Mains.*] By s. 43 of the Southport Improvement Act, 1871 (34 & 35 Vict. c. cxl.), the local board of Birkdale had the exclusive right of laying down gas mains and pipes within the township, and were obliged to keep all present and future gas mains and public lamps in good repair, and were to afford the corporation of Southport (who were the owners and occupiers of gasworks, and were empowered by statute to supply gas in the township of Birkdale) the use of the same for the supply of gas for public and private purposes within the township in consideration of certain payments to be made by the corporation to the local board for every thousand cubic feet of gas supplied to private consumers. The local board had laid mains within the township and had kept them in repair, and had afforded the corporation the use of the same for the supply of gas; the mains were not used for any purpose other than the supply of gas by the corporation. The corporation laid the service pipes from the mains to the premises of private consumers at the cost of the latter, kept the service pipes in repair, and charged and collected all gas rents:—*Held*, that the corporation had only a right to the use

POOR-RATE—*continued.*

of the mains for the sole purpose of the supply of gas, and had no exclusive occupation of the mains so as to render them liable to be rated in respect of them. MAYOR, &c., OF SOUTHPORT *v.* ORMSKIRK UNION ASSESSMENT COMMITTEE - 468

3. —— *Procedure—Valuation List—Time for Appealing — Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 42, *sub-s.* 13—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 42, *sub-s.* 10.] A valuation was made by the overseers of the parish of St. George, Hanover Square, and approved by the assessment committee of St. George's Union. The London County Council appealed against this valuation to the London Quarter Sessions, exercising the jurisdiction formerly exercised by the assessment sessions, on the ground that the totals of the rateable and gross values in the parish were too low. The appeal was entered in due time to be heard at the February sessions, 1891, but owing to the press of business in the Court, and through no default of the parties, it was not heard before the 31st of March of that year. After that date the assessment committee applied for a prohibition to the justices against hearing the appeal on the ground that the time fixed by the Valuation (Metropolis) Act, 1869, for hearing appeals had expired:—*Held*, that, although the Court of quarter sessions were in the same position as the assessment sessions with regard to the restrictions as to the time for hearing appeals, those restrictions did not apply in such a case, and that the justices had authority to hear the appeal, although the time prescribed by the Act had expired; but—*Held*, that the prohibition ought to go on the ground that the appeal was not in reality an appeal against totals, but was an appeal against the value of hereditaments, which would not lie except from a decision of justices in special sessions.—*Quære*, whether the county council had any right of appeal. THE QUEEN *v.* JUSTICES OF COUNTY OF LONDON AND LONDON COUNTY COUNCIL - - - - C. A. 476

—— Appeal — Justices — Disqualification — Interest - - - - 347

See JUSTICES. 3.

PRACTICE—*Action against Firm—Infant Partner — Judgment against Firm — Execution against Partnership Property—Order* XLVIII. *a*, *rr.* 1, 8.] The fact that one of the members of a partnership, which is sued in the firm name, is an infant, does not prevent judgment being obtained against the firm and execution from issuing thereon against the property of the partnership. HARRIS *v.* BEAUCHAMP BROTHERS - - C. A. 534

2. —— *Change of Parties—Death of One of several Defendants — Action remitted to County Court—Application to compel Plaintiff to proceed —Jurisdiction—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*Rules of the Supreme Court*, 1883, *Order* XVII., *r.* 8.] Where an action has been remitted to the county court under 51 & 52 Vict. c. 43, s. 65, all subsequent proceedings must be taken in the county court, and the High Court has no jurisdiction.—One of several defendants, whom it was sought to make severally liable on a contract, died intestate shortly after delivery of defence. Afterwards, but before appointment of an administrator, the plaintiffs obtained an order under 51 & 52 Vict. c. 43, s. 65, remitting the action to the county court. The action was tried in the county court, and judgment was given for the surviving defendants. An administrator to the deceased defendant was appointed, and applied under Order XVII., r. 8, to compel the plaintiffs to proceed against the administrator, or in default for judgment:—*Held*, that, the action having been remitted to the county court, all proceedings must be taken in that Court, and the High Court had no jurisdiction to make an order. DUKE *v.* DAVIS - - - - 107

3. —— *Change of Parties—Death of one of several Defendants—Action remitted to County Court—Application to compel Plaintiff to proceed —Jurisdiction—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*Order* XVII., *r.* 8.] One of several defendants, whom it was sought to make jointly and severally liable on a contract, died intestate shortly after delivery of defence. Afterwards, but before the appointment of an administrator, the plaintiffs obtained an order under the County Courts Act, 1888, s. 65, transferring the action to the county court. The action was tried in the county court, and judgment was given for the surviving defendants. An administrator of the deceased defendant's estate was appointed, and applied in the High Court under Order XVII., r. 8, to compel the plaintiffs to proceed against him, or in default for judgment:—*Held* (affirming the judgment of the Queen's Bench Division), that the order transferring the action to the county court was, at the utmost, merely irregular and not void as against the administrator, and that, as long as that order stood, the High Court had no jurisdiction to make the order for which application was made.—*Semble*, the order transferring the action to the county court was rightly made. DUKE *v.* DAVIS [C. A. 260

4. —— *Defence and Counter-claim—Application for Relief under Conveyancing Acts—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 14, 69—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4.] By s. 4 of the Conveyancing Act, 1892, where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant in a lease, the Court may, on application by any person claiming, as underlessee, any estate or interest in the property "either in the lessor's action or in any action brought by such person for that purpose," make an order vesting for the whole term of the lease or any less term the property comprised in the lease in any person entitled as underlessee upon such conditions as the Court may think fit:—*Held*, that an application by an underlessee for a vesting order under this section may be made by defence and counter-claim in the lessor's action for possession. WARDEN, &C., OF SIR ROGER CHOLMELEY'S SCHOOL AT HIGHGATE *v.* SEWELL - - - - 254

5. —— *Discovery—Photographs of Documents —Order* XXXI., *r.* 14; *Order* L., *r.* 3.] The Court has power to allow a party to an action to take photographs of documents in the possession of the other party. LEWIS *v.* EARL OF LONDESBOROUGH - - - - - 191

PRACTICE—*continued.*

6. —— *Discovery—Affidavit of Documents—Sufficiency of Affidavit—Protection from Production.*] The plaintiffs in an action of trespass, to which the defendants pleaded a right of way, filed an affidavit of documents, in which they stated that they had in their possession documents, numbered 1 to 26, tied up in a bundle marked A, and initialled by one of the deponents; that these documents related solely to the case of the plaintiffs and not to the case of the defendants, nor did they tend to support it; and the plaintiffs, therefore, alleged that the documents were privileged from production. The defendants applied for an order that the plaintiffs should file a further and better affidavit:—*Held*, by the Court of Appeal, that as according to *Taylor* v. *Batten* (4 Q. B. D. 85) an affidavit is sufficient if it contains a description of documents which is sufficient to enable the Court to make and enforce an order for their production, the affidavit in the present case was sufficient.—*Semble*, that the documents were privileged from production, for the case was undistinguishable from *Bewicke* v. *Graham* (7 Q. B. D. 400), with which *Maclean* v. *Jones* (66 L. T. 653) was inconsistent; and that it was not necessary that the affidavit should state that the documents did not tend to impeach the plaintiffs' title. BUDDEN *v.* WILKINSON - - - - C. A. 432

7. —— *Foreign Plaintiff resident Abroad—Motion for New Trial—Security for Costs.*] The plaintiff, a foreigner resident abroad and having no property in England, gave security for the costs of the action. The action was tried and a verdict passed for the defendants. The plaintiff gave notice of motion for a new trial. On an application by the defendants for security for the costs of the motion:—*Held*, that as the motion was a step in the litigation not contemplated when the amount of the security was originally fixed, the proper course was to apply at chambers to increase the amount of the security ordered to be given, and that an appeal from any order made on such an application would lie to the Court of Appeal. BENTSEN *v.* TAYLOR, SONS & CO. [C. A. 193

8. —— *Jurisdiction — Foreign Defendant — Person carrying on Business within the jurisdiction in name or style other than his own—Service of Writ—Order* XLVIIIa, *rr.* 3. 11.] Rule 11 of Order XLVIIIa, provides that "any person carrying on business within the jurisdiction in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply":—*Held*, that the rule did not apply to a foreign subject resident out of the jurisdiction who carried on business within the jurisdiction in a name or style other than his own name. ST. GOBAIN, CHAUNY AND CIREY COMPANY *v.* HOYERMANN'S AGENCY - - - C. A. 96

9. —— *Right to a Jury—Order* XXXVI., *rr.* 4, 6, 7.] By Order XXXVI, r. 4, the Court may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Judicature Act, 1873, could without any consent of parties have been tried without a jury. By rule 6, in any other cause or matter, upon the application of any party thereto, an order shall be made for a trial with a jury. By rule 7, in every cause or matter, unless under the provisions of rule 6 of this order a trial with a jury is ordered—the mode of trial shall be by a judge without a jury.—The plaintiffs brought an action in the Queen's Bench Division in respect of a claim which before the Judicature Act, 1873, might have been sued upon either in Chancery or at common law:—*Held*, that an application by the defendants for the trial of the action with a jury was properly refused, for the defendants could not claim a trial by jury as a matter of right, the case being one which before the Judicature Act could have been tried in Chancery, and which was therefore, within the meaning of Order XXXVI., r. 4, a cause which before the passing of the Act "could without any consent of parties have been tried without a jury," and under rule 7 ought to be tried by a judge without a jury, unless otherwise ordered, and that the case was not altered by the fact that the plaintiffs had brought the action in the Queen's Bench Division. BARING BROTHERS & CO. *v.* NORTH WESTERN OF URUGUAY RAILWAY COMPANY - - - C. A. 406

10. —— *Libel—Justification — Particulars — Facts on which Defendant relies in support of Justification—Order* XIX., *rr.* 6, 7.] In an action of libel, where the charge made against the plaintiff in the alleged libel is general in its nature, a defendant who pleads a justification must state in his particulars the facts on which he relies in support of his justification. Judgment of the Queen's Bench Division affirmed. ZIERENBERG *v.* LABOUCHERE - - C. A. 183

11. —— *Local Venue provided by Statute—Abolition of Local Venues—Order* XXXVI., *r.* 1.] By Order XXXVI., r. 1, "There shall be no local venue for the trial of any action, except where otherwise provided by statute":—*Held*, that, all existing local venues having been abolished by the Judicature Act, 1875, the exception in Order XXXVI., r. 1, operates only in favour of local venues created by statutes passed since the Judicature Act, 1875, and does not have the effect of reviving local venues created by statutes passed prior to that Act. BUCKLEY *v.* HULL DOCKS COMPANY - - - - 93

12. —— *Married Woman—Protection Order—Judgment against Married Woman—Equitable Execution—Interest subject to Restraint on Anticipation—Receiver—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.] A married woman who was entitled to an equitable life interest in the rents of certain premises, for her separate use without power of anticipation, was deserted by her husband, and obtained a protection order under the Matrimonial Causes Act, 1857, s. 21. She subsequently executed a mortgage of her life interest, covenanting to pay the mortgage debt. Judgment having been obtained against her as against a feme sole in an action on the covenant:—*Held*, that, her life interest having devolved upon her before the desertion, the

PRACTICE—*continued.*
restraint on anticipation still attached, and consequently a receiver of her life interest could not be appointed by way of equitable execution on the judgment. HILL *v.* COOPER - C. A. 85

13. —— *Parties — Plaintiffs, Joinder of — Causes of Action, Joinder of—Joinder of several Plaintiffs in respect of separate Causes of Action —Order* XVI., *r.* 1; *Order* XVIII., *rr.* 1, 8.] The several shippers of different shipments of cotton, shipped on the same ship for carriage from and to the same places, having joined as plaintiffs in one action, claiming against the shipowners upon the bills of lading given to them respectively damages for short deliveries:—*Held*, by Lord Esher, M.R., and Kay, L.J. (Bowen, L.J., dissenting), that they were entitled so to join under Order XVI., r. 1, coupled with Order XVIII., r. 1, subject to the power of the Court or a judge under Order XVIII., r. 1 or 8, if it should subsequently appear that any of the claims could not conveniently be tried or disposed of with the others, to order that separate trials should be had, or to make such other order as might be necessary or convenient for the separate disposal thereof. HANNAY & Co. *v.* SMURTHWAITE [C. A. 412

14. —— *Service out of the Jurisdiction—Contract "which, according to the Terms thereof, ought to be performed within the Jurisdiction"—Order* XI., *r.* 1 (*e*).] The plaintiff, a civil engineer carrying on business at Newcastle, was employed by the defendants, who had undertaken to construct docks in Spain, to design and superintend the construction of the same. By the terms of the contract between the plaintiff and the defendants, the plaintiff was to prepare drawings and specifications, to take out quantities, and to superintend the construction of the docks, in consideration of a commission of 5*l.* per cent. on the total cost of the works. He was not to be required to be constantly in attendance, but was to visit the works during their construction once in every three months, and to have a competent assistant constantly in attendance to superintend the construction. He was to be paid travelling expenses in connection with his visits (say 40*l.* British sterling per visit), and the agreed commission was to be payable in cash as follows—viz., 1*l.* 10*s.* per cent. upon the contract price of each contract, as and when it was made, and the remaining 3*l.* 10*s.* per cent. at the expiration of every three months on the value of the work done during such three months, subject to the retention of a certain amount, as security for the performance of the plaintiff's duties, which amount was to be paid to the plaintiff within seventy-five days after the works had been finally completed to the defendants' satisfaction. The contract did not in express terms provide where these payments were to be made. The plaintiff sued for a balance payable to him under the contract:—*Held*, that the true construction of the contract, having regard to the position of the parties and the circumstances under which it was entered into, was that the payments to the plaintiff were to be made at Newcastle; and therefore leave might be given to issue a concurrent writ in the action, and serve notice thereof upon one of the defendants, a foreigner resident out of the jurisdiction, under Order XI., r. 1 (*e*). THOMPSON *v.* PALMER C. A. 80

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—— Justices—Dismissal of information—Order against complainant for costs—Enforcement by committal - - 146
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—— Solicitor — Agreement for remuneration—Reasonableness of amount payable under agreement - - - - 201
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—— Solicitor—Bill of costs—Taxation—Series of bills treated as one—Payment by giving negotiable security - - 286
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See SOLICITOR. 4.

PRINCIPAL AND AGENT—*Contract with Agent for undisclosed Principal—Set-off against Principal of Debt due from Agent—Estoppel.*] The plaintiffs, who were acting for the owners of a cargo, employed B. & C. as their agents to collect from underwriters contributions in respect of a general average loss. B. & C., not being brokers, employed the defendants, who were brokers at Lloyd's, to collect the money, and they did so. At the time when the defendants received the money there was a debt due to them from B. & C. The defendants did not know, and there was nothing, as the Court held, to lead them to suppose, that B. & C. were not acting as principals in the matter, and the defendants believed that B. & C. were acting as principals:—*Held*, that the principle of *George* v. *Clagett* (7 T. R. 359) and *Fish* v. *Kempton* (7 C. B. 687) applied; that the defendants were entitled to stand in the position in which they would have stood if B. & C. had really been principals; and that, consequently, the defendants were entitled to set off against the demand of the plaintiffs for the money which they had collected the debt due to them from B. & C. MONTAGU *v.* FORWOOD C. A. 350

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REVENUE—*Income Tax—English Limited Companies carrying on Trade Abroad—Annual Profits or Gains—Profits Earned Abroad not Remitted to England—Actual Receipt of Profits in England—5 & 6 Vict. c.* 35, *s.* 100, *Sched. D, Fourth and Fifth Cases*—16 & 17 *Vict. c.* 34, *s.* 2, *Sched. D.*] An English limited company, registered under the Companies Acts, and having an office in London, was formed to acquire certain brewing businesses in New York State, in the United States of America. By a law of that State an English company is prohibited from owning and carrying on a brewery there, and the English company thereupon arranged for the formation of an American company, with share capital, and having seven trustees appointed to manage, in the interests of the English company, the businesses in America. All the shares in the American company—except seven, of which each of the trustees held one as a qualifying share—were held by and in the name of the English company. The brewing trade, on which the profits wholly depended, was carried on exclusively at the city of Rochester in New York State. At the end of each financial year the trustees of the American company sent the English company the accounts of the breweries at Rochester for the year, and the directors of the English company, having agreed upon the amount to be distributed out of the profits, informed the American company of the rate of dividend which the directors thought should be declared by that company on their shares. On hearing that the American company had declared a dividend the directors declared a dividend of a similar value upon the shares in the English company. No dividend warrant was issued by the American company, but the amount of profits to be divided on the shares held by the English company, so far as that amount was required for distribution among the shareholders of the English company, was sent over to the English company in London, such portion of the dividend as was required for certain American shareholders in the English company being retained by the American company, and distributed by them direct in America on behalf of the English company:—*Held*, that the profits of the English company arose from "foreign possessions," so as to bring the case within 5 & 6 Vict. c. 35, s. 100, Sched. D, Fifth Case; that the portion of the profits retained in America for distribution among the American shareholders of the English company was not received by that company in England within the meaning of the Fifth Case; that the business on which the profits depended being wholly carried on abroad, the decision of the House of Lords in *Colquhoun* v. *Brooks* (14 App. Cas. 493) applied, and, therefore, that the English company were not liable to pay income tax upon the portion of the profits retained in America.—In another case the appellant company, an English limited company, registered under the Companies Acts, and having an office in London, was formed to acquire, and did acquire, shares in various companies or corporations, with limited liability, trading in explosives in England and in Germany. The affairs of the company were managed and controlled wholly by its directors. It did not carry on any manufacturing business, nor sell any materials or goods, in the United Kingdom or elsewhere. In dividing any profits made the directors declared a dividend in London on all the appellant company's shares, of which a large number were held by foreigners living in Germany. The dividends due to the appellant company in respect of its shares in the German companies were, at the request of the directors, paid by those companies into banks abroad, and applied in paying the dividend, when declared, to the foreign shareholders of the appellant company:—*Held*, that this case also was brought within the decision of the House of Lords in *Colquhoun* v. *Brooks* (14 App. Cas. 493), and therefore that the appellant company was not liable to pay income tax on the profits paid by way of dividend to the foreign shareholders of that company in Germany. BARTHOLOMAY BREWING COMPANY (OF ROCHESTER) *v.* WYATT. NOBEL DYNAMITE TRUST COMPANY *v.* WYATT 499

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—— Order L., r. 3 - - - - 191
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SALE OF GOODS—*Memorandum in Writing—Several Documents — Acceptance — Statute of Frauds*—29 *Car. II., c.* 3, *s.* 17.] The defendant, who carried on business at Manchester, orally agreed to purchase from the plaintiffs, timber merchants at Liverpool, a quantity of spruce deals, to be forwarded to Manchester by a carrier nominated by the defendant. An invoice of the goods was sent by the plaintiffs to the defendant, and the carrier also sent an advice note to inform him of the arrival of the goods at Manchester. This note specified the number of the deals, and stated them to be consigned by the

SALE OF GOODS—*continued.*
plaintiffs, but did not state the price, nor refer to the invoice or any other document. On October 28, the day of the arrival of the goods, and on the following day, the defendant inspected them, and subsequently wrote and signed the following memorandum on the advice note: "Rejected. Not according to representation." On November 8, he wrote to the plaintiffs rejecting the goods as not being according to contract:—*Held*, first, that there was not a sufficient note of the bargain within the 17th section of the Statute of Frauds; secondly, that the proper conclusion from the facts was that there had been no such dealing with the goods by the defendant as to constitute an acceptance of them by him within the same section.—*Morton* v. *Tibbett* (15 Q. B. 428), *Kibble* v. *Gough* (38 L. T. (N.S.) 204), and *Page* v. *Morgan* (15 Q. B. D. 228) considered. TAYLOR *v.* SMITH (1) - C. A. 65

2. —— *Factors Acts—Possession of Goods under Agreement to Purchase—Furniture—Hire and Purchase Agreement—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *ss.* 2, 9—*Dispositions by Sellers and Buyers of Goods.*] By the Factors Act, 1889, s. 2, any sale, pledge, or other disposition of goods made by a mercantile agent in possession of the goods with the consent of the owner shall, if certain specified conditions are fulfilled, be as valid as if the agent were expressly authorized by the owner to make the same; and, by s. 9, where a person, having agreed to buy goods, obtains with the consent of the seller possession of the goods, the delivery by that person of the goods under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller, shall have the same effect as if the person making the delivery were a mercantile agent in possession of the goods with the consent of the owner.—L., being in possession of furniture under a hire and purchase agreement made with the plaintiff, sold and delivered the furniture, before the last payment had accrued due or been paid, to the defendant, who received it in good faith and without notice that the plaintiff had any right in respect of it:—*Held*, that the sale and delivery to the defendant was within the provisions of s. 9, and therefore valid. LEE *v.* BUTLER - - - - - C. A. 318

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SHERIFF — *Interpleader — Money in Hands of Sheriff—Money to abide Order of Court—Right of Sheriff to retain Money till Order.*] A sheriff who had seized goods in execution interpleaded, and an order was made transferring the interpleader proceedings to the county court, the claimants to be at liberty to pay a sum of money to the sheriff, for the release of the goods, "to abide the order of the county court." The money was paid by the claimants to the sheriff, and the proceedings were transferred to a county court. Before the trial of the issue the execution creditor abandoned his claim, and the claimants obtained judgment in the county court, but did not obtain an order as to the money in the hands of the sheriff. The claimants demanded the money from the sheriff, and on his refusal to pay it, brought an action against him for money had and received to their use:—*Held*, that, the sheriff, holding the money under an order of the High Court, was not bound to pay it over without an order of the county court, and that the action could not be maintained. DISCOUNT BANKING COMPANY OF ENGLAND AND WALES *v.* LAMBARDE - C. A. 329

—— Execution — Interpleader — Bankrupt—Receiving order - - - 111
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SHIP—*Charterparty—Breach — Condition precedent or Warranty—Waiver.*] A charterparty, dated March 29, between the plaintiff, a shipowner, and the defendants, described the ship as "now sailed or about to sail from a pitch pine port to the United Kingdom," and provided that the ship should, after discharging homeward cargo, proceed to Quebec, and there load a cargo of timber, and being so loaded should therewith proceed to Greenock, Barrow, or Liverpool, as ordered on signing bill of lading, and deliver the same on being paid freight. At the date of the charterparty both parties knew that the ship was, or had just been, at Mobile, in America, loading a cargo of timber, which she was to carry to Greenock. She did not, in fact, sail from Mobile until April 23. On May 16, the defendants were aware of the date of the sailing, and they then wrote to the plaintiff's brokers, asking if they had any proposal respecting the charter. No proposal was made by the plaintiff, and on June 5 the ship arrived at Greenock. Further correspondence took place, and ultimately the defendants, on June 16, wrote to the plaintiff's brokers, "If you send the ship to load under our charterparty we shall protest against loading and difference of freight and insurance upon goods then shipped."—The ship sailed from Greenock on June 18, and after she had arrived at Quebec, the defendants refused to load her:—*Held*, that the description of the ship as "now sailed or

SHIP—*continued.*

about to sail," was of the substance of the contract; that it was a condition precedent and not a mere warranty; and that on breach of the condition the defendants would have been entitled to repudiate the contract:—But, *held*, that the conduct of the defendants, and in particular the letter of June 16, amounted to a waiver of such right to repudiate the contract, and that they were liable for the freight under the charterparty, but were entitled as against the plaintiff to such damages as they could prove that they had sustained by reason of the breach of the condition. BENSTEN *v.* TAYLOR, SONS & Co. (2). [C. A. 274

2. —— *Charterparty — Restraints of Princes and Rulers — Demurrage — Customary mode of Loading.*] The defendants chartered the plaintiffs' vessel to load a cargo of 3000 tons of nitrate at Iquique in Chili at the rate of 200 tons per working lay day, to be reckoned from the day the vessel was ready to receive cargo to the day of her dispatch, "restraints of princes and rulers, political disturbances or impediments . . . . during the said voyage always mutually excepted."—There was at Iquique only storage room for a small quantity of nitrate, and the customary mode of loading there was to send the nitrate by rail from the mines direct to the ship's side as required for loading.—The vessel arrived at Iquique on January 29; but at that time a civil war had broken out in Chili, and by reason of the existence of a state of war in the town itself it was impossible up to March 5 to load any nitrate from the port. After that date it was possible to load from the port; but in consequence of the railway from the mines to Iquique being in the hands of the troops, no nitrate from the mines could reach Iquique until March 23, on which day the loading commenced, and finished on April 4. The vessel sailed on April 8. She was then short of coal, and it being very dear at Iquique she put in to another Chilian port for it. She was there detained for ten days in consequence of her refusal to pay over again to the Chilian government in power at that port the export duties which she had already paid to the government in power at Iquique. An action having been brought by the plaintiffs for demurrage:—*Held*, that the delay in both cases fell within the exception in the charterparty. SMITH & SERVICE *v.* ROSARIO NITRATE COMPANY 323

3. —— *Charterparty — Advance Freight — Freight payable on signing Bills of Lading—Loss of Cargo before Bills of Lading signed—Liability of Charterer.*] A cargo was shipped under a charterparty which contained the following clause: "The freight to be paid as follows—one-third on signing bills of lading, less 3 per cent. for interest, insurance, &c., and the remainder, on unloading, in cash." Bills of lading were to be signed within twenty-four hours after the cargo was on board. After the commencement of the voyage, and before bills of lading were signed, the vessel sank and the cargo was lost. The charterers thereupon refused to present bills of lading for signature, and the shipowner sued them for breach of the charterparty in so refusing:—*Held*, that the loss of the cargo did not relieve the charterers from their liability to present bills of lading, and that the shipowner was entitled to recover damages equal to the amount of the advance freight. ORIENTAL STEAMSHIP COMPANY *v.* TYLOR - - - - C. A. 518

SHIP—*continued.*

SOLICITOR — *Unqualified Person — Power of County Court Judge to Commit for Contempt Unqualified Person acting as Solicitor — Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 2, 35, 36—*Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 26—*County Courts Act*, 1846 (9 & 10 *Vict. c.* 95), *s.* 113—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 162.] A county court judge has no jurisdiction under s. 26 of the Solicitors Act, 1860, to commit for contempt a person who has acted as a solicitor in an action in the county court without being qualified. THE QUEEN *v.* JUDGE OF BROMPTON COUNTY COURT - - - - - 195

2. —— *Agreement for Remuneration—Reasonableness of Amount payable under Agreement—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 8, 9.] A solicitor was employed by the defendant in lunacy proceedings to attend the taxation of the petitioner's costs which she had been ordered to pay, and it was agreed that the solicitor should be paid 5 per cent. on the amount taxed off the bill of costs. The bill of costs contained items for daily refreshers to counsel far exceeding the maximum amount per diem allowed by the rules, and of the whole bill of 5000*l.* nearly 2000*l.* was taxed off, the principal part of which consisted of such refreshers. On an application under the Attorneys and Solicitors Act, 1870, by the defendant to set aside the agreement as unfair and unreasonable:—*Held* (affirming the judgment of the Queen's Bench Division), that such an agreement must not only be fair in the sense that it was understood by the client, but must be reasonable in amount, having regard to the work done, and that the agreement was unreasonable in this respect, and must be set aside. IN RE STUART. EX PARTE CATHCART - C. A. 201

3. —— *Bill of Costs — Taxation — Series of Bills treated as one—Payment by giving Negotiable Security.*] Where a solicitor is retained to conduct litigation, other than an ordinary action at common law, which may extend over a considerable period of time, and in which breaks may occur of such a kind as to be equivalent to the conclusion of a definite and distinct part of the proceedings, he may deliver to his client a bill of costs for business done up to the occurrence of any such breaks in the litigation, and demand payment. Where, however, in the course of the proceedings several bills of costs have been sent in at different times by the solicitor, it is always a question of fact whether they were sent in as final bills for work done up to the occurrence of any such break in the litigation, so as to be separate bills and therefore not liable to taxation after the lapse of twelve months, or whether they were merely statements of account or portions of one entire bill, so as to make the whole liable to taxation if the last part has been delivered within twelve months of the application to tax.—*Semble*, that the making of an award and its remission to the arbitrator for reconsideration may be treated as breaks in protracted arbitration proceedings,

SOLICITOR—*continued.*

upon the occurrence of which the solicitor may send in such a bill of costs to his client as to amount to a separate bill.—The handing by a client to his solicitor of a negotiable security for the amount of his bill of costs, coupled with the giving of a receipt by the solicitor in which it is expressed to be taken "in settlement" of his bill, does not amount to payment in the event of the negotiable security being dishonoured, unless there be proof (the onus of which lies on the solicitor) that such was at the time the intention of the parties, and that the client was aware of the effect of the transaction upon his right to tax the bill of costs. IN RE ROMER & HASLAM [C. A. 286

4. —— *Striking off the Roll—Offence not in the Character of Solicitor—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.] Upon an application by the Incorporated Law Society to strike the name of a solicitor off the roll, it appeared that he had been summarily convicted of allowing houses, of which he was the landlord, to be used by the tenants as brothels:—*Held*, that a solicitor may be struck off the roll for an offence which has no relation to his character as a solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence primâ facie makes a solicitor unfit to continue on the roll; but the Court has a discretion, and will inquire into the nature of the crime, and will not as a matter of course strike him off because he has been convicted; and the Court considered that in the present case the nature of the offence was such that the solicitor ought to be struck off the roll:—*Held*, also, that an application to the Committee of the Incorporated Law Society under the Solicitors Act, 1888, s. 13, was not a condition precedent to the application to strike the solicitor off the roll, the case being one where no report of a Master would have been necessary before the Act, and the old jurisdiction of the High Court being saved by s. 19. IN RE WEARE. IN RE THE SOLICITORS ACT, 1888 - - - - C. A. 439

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9 Geo. 2, c. 36 - - - - 19
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17 Geo. 2, c. 3, s. 1 - - - 451
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59 Geo. 3, c. 12, s. 17 - - - 19
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9 Geo. 4, c. 61, ss. 4, 14 - - - 530
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TITHES—*Rating of Owner of Tithe Rent-charge—Tithe Act*, 1891 (54 & 55 *Vict. c.* 8)—*Arrears of Rates due before passing of Act—Deduction of, from Tithe Rent-charge accruing after Act—Repeal—Saving of existing Rights and Liabilities.*] By s. 6 of the Tithe Act, 1891: "Any rate to which tithe rent-charge is subject shall be assessed on, and may be recovered from the owner of the tithe rent-charge . . . and so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed."—At the date of the passing of the said Act, certain rates upon a tithe rent-charge, of which the appellant was the owner, were due and in arrear, owing to the neglect of the overseers to demand payment thereof from the occupiers of the lands out of which the tithe rent-charge issued. The tithe rent-charge for the period in respect of which the said rates were due had been paid to the appellant in full. After the passing of the Act the overseers, purporting to act under s. 8 of the Tithe Act, 1837, demanded payment of the said arrears of rates from the occupiers of the land, who paid them and were allowed the amount thereof by their landlord, the respondent, out of the half-year's rent becoming due next after such payment. Subsequently thereto a half-year's tithe rent-charge became payable by the respondent, as owner of the land, to the appellant. The respondent claimed to deduct therefrom the amount which he had allowed to the occupiers out of their rent in respect of the said arrears of rates so paid by them:—*Held*, that, having regard to the provisions of s. 6 of the Tithe Act, 1891, the payment of the arrears of rates by the occupiers was a voluntary payment which they were not entitled to deduct from their rent, and that the respondent was consequently not entitled to make the deduction claimed from the tithe rent-charge due to the appellant. IN RE THE TITHE ACT, 1891. ROBERTS *v.* POTTS - 33

2. —— *Liability of Occupier under Contract made before passing of Act—Omission of Landowner to serve Occupier's Liability Notice—Application to County Court for Certificate—Tithe Act.*

TITHES—*continued.*

1891 (54 & 55 *Vict. c.* 8), *s.* 2, *sub-s.* 6.] By s. 1 of the Tithe Act, 1891, an occupier who, under a contract made before the passing of the Act, was liable to pay the tithe rent-charge is made liable to repay to the owner of the lands the amount of tithe rent-charge properly paid by him to the tithe-owner, and by s. 2, sub-s. 6, the landowner must serve on the tithe-owner an occupier's liability notice before he can recover such amount from the occupier, unless he obtains from the county court judge a certificate that there was good and sufficient cause for his failure to give such notice, and that the occupier has not been prejudiced thereby:—*Held*, that on an application by the landowner for such certificate it was not necessary to shew the liability of the occupier to pay the tithe rent-charge under a contract made before the passing of the Act. IN RE THE TITHE ACT, 1891. HUGHES *v.* RIMMER - 314

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